FILED

DEC 31 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BPM, LTD.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-379-E
	)	
UNITED ENERGY JOINT VENTURE,	)	
	)	
Defendant.	)	

NOTICE OF DISMISSAL

COMES NOW the Plaintiff pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure and hereby dismisses this action, without prejudice.

OLIVER & EVANS, INC.

By _____
Gomer A. Evans
Attorneys for Plaintiff
2406 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119

CERTIFICATE OF MAILING

I, Gomer A. Evans, do hereby certify that on the 31st day of December, 1980, I mailed a true and correct copy of the above and foregoing Notice of Dismissal, with proper postage thereon prepaid, to James C. Lang, Esq., Sneed, Lang, Adams, Hamilton, Downie & Barnett, Fourth Floor, Six East Fifth, Tulsa, Oklahoma 74103.

_____
Gomer A. Evans

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROXIE L. HILTON,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS,
Secretary of Health,
Education and Welfare,

Defendant.

No. 80-C-125-B

J U D G M E N T

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the defendant, Secretary of Health and Human Services of the United States of America (Secretary), and after due proceedings had, and upon examination of the pleadings and record filed herein, including the briefs submitted by the parties, the Court is of the opinion as shown by its Order filed simultaneously herewith that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the final decision of the Secretary should be and hereby is affirmed.

DATED this 31 day of Dec, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor, United States Department of Labor, Plaintiff,	)	Civil Action File
v.	)	No. 80-C-386-C
JOHN TOWNSEND GRAPHICS UNLIMITED d/b/a TOWNSEND TOP SHOP and JOHN TOWNSEND and KENT TOWNSEND, individuals, Defendants.	)	

JUDGMENT

Plaintiff has filed his complaint and defendants have waived their defenses and have agreed to the entry of judgment without contest, it is, therefore, upon motion of the plaintiff and for cause shown,

. . . . . .

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Section 11(c) of the Occupational Safety and Health of 1970 (84 Stat. 1590, 29 U.S.C. §651 et. seq.), hereinafter referred to as the Act, in any of the following manners:

Defendants shall not, contrary to Section 11(c) of the Act 29 U.S.C. §660(c)(1) discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

It is further ORDERED, ADJUDGED and DECREED that all parties having, in good faith, joined in a settlement agreement, attached hereto as Exhibit A, the parties shall adhere to all requirement of that agreement.

It is further ORDERED that each party is to bear its own costs in this action.

Done and ordered this 31 day of Dec, 1980.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

Defendants waive their defenses to plaintiff's complaint and consent to the entry of this judgment:

John J. Ramsay
JOHN J. RAMSAY
Attorney for Defendants

John Townsend
Kent Townsend
JOHN TOWNSEND and KENT TOWNSEND,
Defendants

Plaintiff moves for entry of this judgment:

CARIN A. CLAUSS
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

HERIBERTO DE LEON
Counsel for Employment Standards

By:

PATRICIA D. KEANE
Attorney

Attorneys for RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Plaintiff.

P. O. ADDRESS:

Office of the Solicitor
U. S. Department of Labor
555 Griffin Square Bldg., Suite 501
Dallas, Texas 75202

Telephone No. 214/767-4902

SOL Case No. 12488

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IDA G. JONES,

Plaintiff,

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services,

Defendant.

No. 79-C-365-C

FILED

DEC 30 1980

JUDGMENT

The Court has before it for consideration the Findings and Recommendations of the Magistrate filed on December 17, 1980, in which it is recommended that judgment be entered for the defendant. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of all the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is hereby Ordered that judgment be and hereby is entered for the defendant.

It is so Ordered this 30 day of December, 1980.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 30 1980

HOME INDEMNITY COMPANY, A Corporation, Plaintiff,	)	
vs.	)	NO. 80-C-112-B
EXPLORER PIPELINE COMPANY, et al, Defendants.	)	

ORDER OF DISMISSAL

Upon joint application of the parties, it appearing to the Court that the controversy herein has been settled by and between the parties,

IT IS HEREBY ORDERED that this cause be and the same is dismissed with prejudice to any future action thereon and without costs to either party.

DATED this 30th day of December, 1980.

S/ THOMAS R. BRETT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

BOARD OF TRUSTEES OF THE PLUMBERS AND PIPEFITTERS NATIONAL PENSION FUND; BOARD OF TRUSTEES OF THE HEALTH AND WELFARE FUND OF THE PLUMBERS AND PIPEFITTERS LOCAL UNION 205, Tulsa, Oklahoma; BOARD OF TRUSTEES OF THE TULSA PIPE TRADES TRAINING SCHOOL APPRENTICESHIP FUND,	)	
Plaintiff,	)	
vs.	)	No. 80-C-697-B
SAM'S REFRIGERATION, INC.,	)	
Defendant.	)	

NOTICE OF DISMISSAL

TO: Sam Dodson
Sam's Refrigeration, Inc.
5720 South 66th East Avenue
Tulsa, Oklahoma 74145

Please take notice that the plaintiff discontinues the above-entitled action and dismisses the Complaint without prejudice.

DATED this 30 day of December, 1980

DYER, POWERS, MARSH, TURNER & ARMSTRONG

By _____
TOM L. ARMSTRONG
Attorneys for Plaintiff
525 South Main, Suite 210
Tulsa, Oklahoma 74103
(918) 587-0141

CERTIFICATE OF MAILING

The undersigned hereby certifies that a full, true and correct copy of the above and foregoing Dismissal with Prejudice was mailed to Sam Dodson, Sam's Refrigeration, Inc., 5720 South 66th East Avenue, Tulsa, Oklahoma 74145 on this 30 day of December, 1980, with proper postage thereon fully prepaid.

_____
TOM L. ARMSTRONG

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GEARHART INDUSTRIES, INC., a Texas corporation,	)	
Plaintiff,	)	
vs.	)	No. 80-C-404-C
PRODUCTION OIL CORPORATION, a foreign corporation; CITIES SERVICE GAS COMPANY, a Delaware corporation, et al.,	)	
Defendants.	)	

O R D E R

Now before the Court is the Motion of defendants Mackie and King to dismiss based on their contention that this Court lacks diversity jurisdiction under Title 28, U.S.C. §1332, or in the alternative, to dismiss this action by reason of the prior pending cases of these defendants in Nowata County, Oklahoma, involving substantially the same issues; or in the alternative, to enter an order staying further proceedings herein until the conclusion of the proceedings in Nowata County, Oklahoma.

Also before the Court is the motion of defendant NOWSCO, a Texas corporation, to dismiss this action for lack of diversity of citizenship, and for improper venue. A similar motion to dismiss for lack of diversity jurisdiction has been filed in this action by Production Oil Corporation.

On the face of the complaint diversity jurisdiction is lacking under Title 28, §1332, since the plaintiff, Gearhardt Industries, Inc. and one defendant, NOWSCO, are both Texas corporations. Therefore this Court is without proper jurisdiction to hear this matter. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 686, 85 L.E. 1214, (1941); Warner Bros. Records, Inc. v. R. A. Ridges Distributing Co., Inc.,

36.

475 F.2d 262 (10th Cir. 1973). While the plaintiff has suggested that realignment of the parties as a solution to the admitted problem of lack of diversity, realignment is not required as a matter of law, nor has the Court been provided with sufficient information to determine whether such realignment is proper.

For these reasons, it is hereby ordered that the defendants' motion to dismiss for lack of jurisdiction under Title 28 §1332 is hereby sustained.

It is so Ordered this 29th day of December, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GEARHART INDUSTRIES, INC., a Texas corporation,	)	
Plaintiff,	)	
vs.	)	No. 80-C-404-C
PRODUCTION OIL CORPORATION, a foreign corporation; CITIES SERVICE GAS COMPANY, a Delaware corporation, et al.,	)	
Defendants.	)	

O R D E R

Now before the Court is the Motion of defendants Mackie and King to dismiss based on their contention that this Court lacks diversity jurisdiction under Title 28, U.S.C. §1332, or in the alternative, to dismiss this action by reason of the prior pending cases of these defendants in Nowata County, Oklahoma, involving substantially the same issues; or in the alternative, to enter an order staying further proceedings herein until the conclusion of the proceedings in Nowata County, Oklahoma.

Also before the Court is the motion of defendant NOWSCO, a Texas corporation, to dismiss this action for lack of diversity of citizenship, and for improper venue. A similar motion to dismiss for lack of diversity jurisdiction has been filed in this action by Production Oil Corporation.

On the face of the complaint diversity jurisdiction is lacking under Title 28, §1332, since the plaintiff, Gearhardt Industries, Inc. and one defendant, NOWSCO, are both Texas corporations. Therefore this Court is without proper jurisdiction to hear this matter. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 686, 85 L.E. 1214, (1941); Warner Bros. Records, Inc. v. R. A. Ridges Distributing Co., Inc.,

475 F.2d 262 (10th Cir. 1973). While the plaintiff has suggested that realignment of the parties as a solution to the admitted problem of lack of diversity, realignment is not required as a matter of law, nor has the Court been provided with sufficient information to determine whether such realignment is proper.

For these reasons, it is hereby ordered that the defendants' motion to dismiss for lack of jurisdiction under Title 28 §1332 is hereby sustained.

It is so Ordered this 29th day of December, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 29 1980

ETHREA MEANOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-659-E
	)	
PENN MUTUAL LIFE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

The parties having so stipulated and agreed, IT IS ORDERED that this action be dismissed with prejudice, each party to bear her~~s~~ or its own costs.

Furthermore, the parties having so stipulated and agreed, IT IS ORDERED that the principal amount of $7,056.18 and all interest accrued thereon, deposited in an interest-bearing account pursuant to an Order of this Court on the 22nd day of May, 1980, shall be disbursed ~~dispursed~~ to the above named Plaintiff in this action.

Given under my hand this 29th day of December, 1980.

James O. Ellison

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER,

Plaintiff,

vs.

JOHN UMHOLTZ and
JERRY McMILLEN, et al.,

Defendants.

No. 80-C-501-B

O R D E R

This case comes before the Court on a Motion to Dismiss by defendants, John Umholtz and Jerry McMillen.

Plaintiff, Robert E. Cotner, asserts a three-part cause of action against defendants Umholtz and McMillen, members of the Organized Crime Division of the Tulsa Police Department:

COUNT I: "Bribery, blackmail, violation of rights of privacy and 'conspiracy' in violation of state 'and' federal laws and illegal wiretaping(sic]."

COUNT II: "Violation of rights guaranteed by public laws of the United States and violation of rights guaranteed by the United States Constitution."

COUNT III: "Violation of federal civil rights act, criminal provision, Title 18 §241 and 242,- and conspiracy, (subject to prosecution -and- civil redress."

For the reasons below, defendants' Motion to Dismiss is hereby sustained.

It is settled law that a Complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a pro se Complaint, the Court should apply "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519 (1972). Nonetheless, a Motion to Dismiss is proper where the pro se Complaint contains only conclusory allegations which are not supported

by reference to material facts. See Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977). "Where the plaintiff has failed to plead facts supporting vague claims, the Courts need not conjure up unpleaded facts supporting conclusory suggestions." O'Brien v. DiGrazia, 544 F.2d 543, 546 n. 3 (1st Cir. 1976).

In the present case, taking plaintiff's Complaint as a whole, the following facts have been alleged:

1. Plaintiff was engaged in gathering evidence against members of organized crime in the Tulsa area.

2. Reney Hensley, a prostitute, was assisting plaintiff.

3. Upon learning that Ms.Hensley was assisting plaintiff, defendants arrested her, "accepted her services" in exchange for dismissal of charges against her, and blackmailed her to "intrap"[sic] the plaintiff.

4. Ms. Hensley called plaintiff on about September 1, 1979 and attempted to "lure" plaintiff into the commission of a crime.

5. Defendants recorded the phone call between plaintiff and Ms. Hensley without a court order and failed to give plaintiff notice of such surveillance either directly or by means of electronic "beeps."

6. Defendants "conspired" to go in disguise and "hinder" plaintiff from supplying information to the "Texas Rangers Police Force" regarding organized crime. The actual hinderance resulted from plaintiff's arrest and incarceration.

Count I of plaintiff's Complaint essentially charges defendants with bribery, blackmail, invasion of privacy, conspiracy, and illegal wiretapping. However, but for invasion of privacy, these claims are not cognizable in a civil suit. Furthermore, the alleged "facts" do not support a cause of action either for invasion of privacy or for any other cause asserted in Count I. Indeed, the face of this Complaint makes clear that the surveillance in this case was not illegal since one party had consented to the wiretap in question. See Rathbun v. United States, 355 U.S. 107 (1957). Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Count II charges defendants with violating plaintiff's constitutional rights. However, the facts alleged above clearly do not support this claim. Even the most generous reading of these allegations suggests merely that plaintiff was the target of a legal wiretapping and was subsequently arrested. Beyond this, plaintiff's Complaint contains no more than conclusory allegations that defendants' acts violated plaintiff's constitutional rights. Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Count III asserts that the facts surrounding plaintiff's arrest and incarceration constitute a violation of 18 U.S.C.A. §241-242. It is sufficient here to note that these criminal statutes do not allow for civil recovery. See United States ex rel Savage v. Arnold, 403 F.Supp. 172 (E.D. Penn. 1975); see also Sarelas v. Anagnost, 332 F.2d 111 (7th Cir. 1964). Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Plaintiff has alleged no facts which, if proven, would entitle him to relief. Defendants' Motion to Dismiss is hereby sustained.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

12/2 6/80

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 24 1980

ORVILLE M. GRIFFIN and CARMELITA GRIFFIN, Plaintiffs,	)	
vs.	)	No. 80-C-637-B
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., a foreign corporation, Defendant.	)	

O R D E R

This case comes before the Court on defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc.'s Motion to Dismiss. In view of the Order entered by this Court on December 10, 1980 in Griffin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., No. 78-C-620, In the United States District Court for the Northern District of Oklahoma, plaintiffs Griffin in this case have withdrawn any objections to defendant's motion. Therefore, defendant's Motion to Dismiss is hereby sustained.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

12/24/80

FILED

DEC 24 1980

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD E. CARLOCK, ET AL., Plaintiffs,	)	
vs.	)	NOS. 79-C-664-BT
JOHNNY CARSON SISK, Defendant,	)	79-C-700-BT
	)	79-C-701-BT
and	)	79-C-708-BT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Garnishee.	)	(Consolidated)

ORDER ASSESSING ATTORNEYS FEES

On November 25, 1980 and December 19, 1980, the Court heard considerable evidence offered by the plaintiffs and the defendant concerning a reasonable attorney's fee to be awarded the prevailing party pursuant to Title 12 O.S.(1978) §1190A.

The Court finds a reasonable number of hours required to properly pursue these consolidated garnishment actions is 250 hours. The parties agreed $100.00 per hour is a reasonable hourly rate.

After considering factors set forth in Oliver's Sports Center, Inc. v. National Standard Insurance Company, 615 P.2d 291 (Okl.1980) along with the evidence in the record the Court concludes a reasonable attorney's fee herein is $35,000.00.

IT IS THEREFORE ORDERED judgment is hereby entered for the plaintiffs and against the defendant as and for a reasonable attorney's fee in the sum of $35,000.00, plus interest at the rate of 12% from this date.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

12/24/80

11

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER,

Plaintiff,

vs.

DOUG HAYES, (Bixby Police Department), et al.,

Defendants.

No. 80-C-446-B

O R D E R

This case comes before the Court on a Motion to Dismiss by defendant Doug Hayes.

Plaintiff, Robert E. Cotner, asserts a three-part cause of action against defendant Hayes, a member of the Bixby Police Department: a violation of 18 U.S.C.A. §241-242 (a criminal statute proscribing conspiracy to deprive an individual of his civil rights); a violation of "Oklahoma trade secrets statutes", and; a violation of plaintiff's "guaranteed constitutional rights." For the reasons below, defendant's Motion to Dismiss is hereby sustained.

It is settled law that a Complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In addressing a pro se Complaint, the Court should apply "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519 (1972). Nonetheless, a Motion to Dismiss is proper where the pro se Complaint contains only conclusory allegations which are not suggested by references to material facts. See Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977). "Where the plaintiff has failed to plead facts supporting vague claims, the Courts need not conjure up unpleaded facts supporting such conclusory suggestions.'" See e.g. O'Brien v. DiGrazia, 544 F.2d 543, 546, n.3 (1st Cir. 1976).

In applicable part, 18 U.S.C.A. §241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--
>
> "They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Similarly, 18 U.S.C.A. §242 provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

However, these criminal statutes do not allow for civil recovery. See United States ex rel Savage v. Arnold, 403 F.Supp. 172 (E.D. Penn. 1975); see also Sarelas v. Anagnost, 332 F.2d 111 (7th Cir. 1964). Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Plaintiff vaguely asserts a violation of the "Oklahoma trade secret statutes." In support thereof, plaintiff alleges

> "defendent knew plaintiff had been/was a private investigator, and defendent constantly tried to find out who plaintiffs informents were and how plaintiff 'operated.' He then proceaded to use these 'trade secrets' for his own benifit, and to the great harm of plaintiff..." (Spellings as in original)

Accepting these allegations as true, the Court finds that plaintiff's Complaint fails to state a claim upon which relief can be granted. Inquiry into the modus operandi of a criminal defendant is clearly within the scope of duty of any law enforcement officer. To characterize questions in this regard as a violation of the "trade secrets statutes" is not justified and would severely limit an officer's investigative capability. Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Finally, plaintiff asserts that defendant acted to violate plaintiff's "guaranteed constitutional rights." In support thereof, plaintiff alleges as follows:

> "Defendent[sic] conspired with others to deprive plaintiff of his rights as guranteed[sic] by the United States Constitution, as stated in C-80-1520,(Tulsa state court), in 80-C-401-E(Tulsa, federal) and other pending civil cases which are against other persons and are not otherwise connected to this case, except for reference as to the same constitutional rights being violated. And see 80-C-433-E (Tulsa federal court)."

The Court finds that such "facts" are no more than conclusory allegations that this defendant violated plaintiff's constitutional rights. Consequently, these alleged facts are insufficient as a basis upon which to found plaintiff's constitutional claim.

However, as the Complaint here is pro se, the Court must look to all the allegations contained therein to determine whether plaintiff's constitutional claim has a factual basis.

Plaintiff alleged the following facts in support of his claim that defendant violated 18 U.S.C.A. §241-242:

> "On night of arrest, defendent refused to arrest plaintiff, but ask plaintiff to meet him in a bar later on, and when plaintiff later appeared in said bar, defendent still refused to arrest plaintiff, but instead bought plaintiff a drink, then several moments late, after his co-conspirators had sliped up behind plaintiff and put a gun to the base of plaintiff's head, and defendents other co-conspirators were pointing shotguns at plaintiff, defendent then arrested plaintiff for

> "allegedly giveing him 1 marijuna cigaratte 2 weeks earlier! -Defendent and his co-conspiritors knew that if they had told plaintiff there was a warrent for his arrest, plaintiff would have contacted his lawyer and turned his-self in, as usual. Defendent and his co-conspiritors refused to attempt an arrest while plaintiff was in Bixby." (Spellings as in original)

Essentially, plaintiff focuses on the manner in which defendants chose to effect his arrest. Plaintiff does not assert that the arrest was constitutionally improper. Rather, plaintiff seems to suggest that it was unnecessary for defendant to employ law enforcement resources to effect the arrest. The Court finds that the events surrounding plaintiff's arrest did not constitute a violation of plaintiff's constitutional rights.

Finally, the Complaint contains factual allegations that defendant Hayes inquired into plaintiff's method of operation. These assertions were discussed in some detail supra. The Court finds that these allegations, if proven, would not constitute a violation of plaintiff's constitutional rights.

In view of the above, the Court concludes that the Complaint, taken as a whole, does not contain factual allegations that amount to a violation of plaintiff's constitutional rights. Therefore, this aspect of plaintiff's cause of action cannot be sustained.

Plaintiff has alleged no facts which, if proven, would entitle him to relief. Defendant's Motion to Dismiss is hereby sustained.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

12/24/80

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HELENE SHAHAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 80-C-324-B
	)	
RCA MUSIC SERVICE, INC., and CORPORATE COLLECTION SERVICE, INC.,	)	
	)	
Defendants.	)	

FILED
DEC 23 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER ALLOWING DISMISSAL AS TO
DEFENDANT RCA MUSIC SERVICE, INC.

The Stipulation for Dismissal as to Defendant RCA Music Service, Inc. jointly agreed to by counsel for plaintiff and said defendant coming before the court, and tne court finding that said dismissal is proper and should be allowed.

IT IS, THEREFORE, ORDERED that the Complaint filed herein by Helene Shahan, plaintiff against Defendant RCA Music Service, Inc., be and it hereby is, dismissed with prejudice without assessment of court costs, attorney's fees or any other relief against either such party.

Thomas R. Brett
UNITED STATES DISTRICT COURT JUDGE
12/23/80

12.

FILED

DEC 22 1980

U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILL'S COAL COMPANY, INC.
an Oklahoma corporation,

Plaintiff

vs.

Case No. 79-C-623-E

BUCYRUS-ERIE COMPANY,
a Delaware corporation,

Defendant

ORDER

The Court has before it for consideration a joint motion filed both by plaintiff and defendant encaptioned "Joint Motion To Tranfer Cause", praying for an order transferring this case to the United States District Court for the Eastern District of Wisconsin.

Finding that good cause exists for the granting of the said joint motion, IT IS HEREBY ORDERED that the Clerk of this Court transfer, assign, and convey the instant proceedings to the Clerk of the Court of the United States District Court for the Eastern District of Wisconsin.

IT IS SO ORDERED this 22nd day of December, 1980.

United States District Judge

APPROVED:

LOGAN, LOWRY, JOHNSTON & SWITZER
P. O. Box 558
Vinita, Oklahoma 74301
(918) 256-7511
Attorneys for Plaintiff

By: Donald K. Switzer
Donald K. Switzer

HALL, ESTILL, HARDWICK
GABLE, COLLINGWORTH & NELSON
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172
Attorneys for Defendant

By: Fred S. Nelson
Fred S. Nelson

8.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 22 1980

COMMERCIAL CREDIT EQUIPMENT CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	
v.	)	No. 80-C-418-E
COLONIAL BRICK COMPANY, LTD., an Oklahoma corporation, and REEVES D. INGOLD, an individual,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

On this 19th day of December, 1980, comes on to be heard, Plaintiff appearing by and through its attorney, James W. Dunham, Jr., and Defendants, Colonial Brick Company, Ltd., an Oklahoma corporation, appearing by and through its attorney, G. Nash Lamb, of Lawrence, Scott & Lamb, hereby acknowledges to this Court that said parties have entered into an agreement regarding the disposition of the above-entitled cause and the Defendant, Colonial Brick Company, Ltd., an Oklahoma corporation, acknowledges its liability for all sums due and owing as set forth in Plaintiff's Petition on file herein regarding a certain lease agreement entered into between Plaintiff and Defendant, Colonial Brick Company, Ltd.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Colonial Brick Company, Ltd., an Oklahoma corporation, to be justly indebted to the Plaintiff in the amount of Nineteen Thousand One Hundred Twenty-Eight and 56/100 Dollars ($19,128.56), with interest thereon prior to judgment and subsequent to judgment, an attorney's fee and all costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, have and recover from the Defendant, Colonial Brick Company, Ltd., the sum of Nineteen Thousand One Hundred Twenty-Eight and 56/100 Dollars ($19,128.56) with interest thereon

prior to judgment and subsequent to judgment, together with an attorney's fee in the amount of Two Hundred Dollars ($200.00) and all costs of this action.

S/ JAMES O. ELLISON
Judge of the District Court

APPROVED AS TO CONTENT AND FORM:

James W. Dunham, Jr., Attorney for Plaintiff

G. Nash Lamb, Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HOWARD L. BARNES,)
)
Plaintiff,)
)
vs.) No. 80-C-340-B
)
T.R.W. REDA PUMP COMPANY,)
)
Defendant.)

O R D E R

Plaintiff instituted this action alleging discrimination based on race, sex and age under the provisions of Title VII of the Civil Rights Act of 1967 [Title VII], 42 U.S.C. §2000e et seq., and the Age Discrimination on Employment Act of 1967 [ADEA], 29 U.S.C. §623(a) et seq. Defendant has filed a Motion to Dismiss pursuant to F.R.Civ.P. 12(b).

The matter was set for hearing and oral argument on December 18, 1980. The Court heard the statements and argument of counsel and documentary evidence was introduced. The matter was taken under advisement.

Plaintiff alleges that he is a 53 year old Indian male, who has been employed for some 27-1/2 years and is presently employed by defendant. Plaintiff contends his job was given to a 26 year old white female. The chronology of events developed at the hearing are in December of 1978 his position was given to a 26 year old white female, but that it was not until January 8, 1979, that he was given a new position, at a "lesser rate of pay." It is plaintiff's contention he has been discriminated against on the basis of race, sex, and age.

Defendant, in its Motion to Dismiss, contends the complaint shows on its face plaintiff has not established the receipt of a "right to sue" letter from EEOC, a jurisdictional prerequisite for a Title VII action. Defendant further contends

the complaint shows on its face plaintiff failed to file a charge of age discrimination with the EEOC pursuant to the Age Discrimination Act of 1967, within 180 days of the occurrence of the alleged unlawful act and thus the Court lacks jurisdiction.

On June 14, 1979, plaintiff filed a form completed complaint based on race and sex discrimination with the Oklahoma Human Rights Commission, alleging discrimination occurring on January 8, 1979. He checked the box on the complaint form to indicate he wanted the complaint filed with the Equal Employment Opportunity Commission. (Plaintiff's Exhibit A-2 attached to brief filed August 25, 1980) On June 27, 1979, a typewritten complaint was filed by plaintiff with the Oklahoma Human Rights Commission. This complaint was assigned number 740-79-E. On this complaint the discrimination was indicated as "race/color", not "sex." Attached to said complaint was a narrative of plaintiff dated May 23, 1979, delineating alleged discriminatory acts. (Defendant's Exhibit 2)

On Janury 4, 1980, the EEOC wrote plaintiff a letter, enclosing among other things, an Age Discrimination Charge. The letter stated in pertinent part (Plaintiff's Exhibit 1):

> "After reading over the information you submitted to me in December, I believe it is more comprehensive that(sic) the statement I took from you over the phone. You did state over the phone that you thought age was a factor because the company has been pressuring others about retiring..."

Plaintiff filled out the Age Discrimination charge on January 7, 1980. (Plaintiff's Exhibit 1)

On January 25, 1980, the Equal Employment Opportunity Commission wrote plaintiff and defendant notifying defendant of the age discrimination charge. (Defendant's Exhibit 1)

On March 14, 1980, the District Director of the EEOC wrote a letter to plaintiff and defendant, wherein it was noted plaintiff had furnished the EEOC with a charge alleging unlawful

discrimination based on the Age Discrimination in Employment Act. The letter further advised conciliation efforts had been unsuccessful and advised plaintiff he now had a right to obtain an attorney and bring suit in Federal Court for age discrimination against the employer. (Attachment to plaintiff's complaint)

TITLE VII CLAIM--42 U.S.C. §2000e et seq.

Plaintiff has not alleged receipt of the "right to sue" letter from the EEOC nor has he attached such letter to his complaint. At the December 18, 1980 hearing, plaintiff's counsel admitted the right to sue letter had not been received at the time the complaint was filed in this Court on June 16, 1980. Plaintiff argues the notice of failure to conciliate his age discrimination claim is sufficient to confer jurisdiction as to the race and sex discrimination alleged pursuant to Title VII.

Under the 1972 amendments, Title VII provides the person claiming to be aggrieved a 90-day period within which to file a civil action after receipt of notification from the EEOC of its failure to conciliate the Title VII claim.

In Alexander v. Gardner-Denver, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court said:

> "Title VII...vest[s] federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue."

See also Electrical Workers v. Robbins and Myers, Inc., 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 425 (1976); United Airlines, Inc., v.Evans, 431 U.S. 553, f.4, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; Omawale v. WBZ, 610 F.2d 20, 22, f.4

(1st Cir. 1979); Clark v. Chasen, 619 F.2d 1330, 1333 (9th Cir. 1980); Movement for Opportunity, Etc. v. General Motors, 622 F.2d 1235, 1240 (7th Cir. 1980); Fewlass v. Allyn & Bacon, Inc., 83 F.R.D. 161, 163 (USDC Mass. 1979); Hunter v. Ward, 576 F.Supp. 913, 917 (USDC ED Ark. 1979); Collins v. Southwestern Bell Telephone Company, 376 F.Supp. 979 (USDC ED Okl. 1974).

The EEOC Notice of Failure to Conciliate plaintiff's age discrimination claim cannot be used by plaintiff as a right to sue letter to meet the jurisdictional requirements of a Title VII suit for race or sex discrimination.

The Court finds defendant's Motion to Dismiss the Title VII claim should be sustained.

AGE DISCRIMINATION IN EMPLOYMENT ACT--29 U.S.C. §623(a) et seq.

The Age Discrimination in Employment Act of 1967 [as amended April 6, 1978] provides "no civil action may be commenced by an individual...until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed...within 180 days after the alleged unlawful practice occurred." 29 U.S.C. §626(d). All functions vested in the Secretary of Labor pursuant to §626 were transferred to the Equal Employment Opportunity Commission by Section 2 of 1978 Reorg.Plan No. 1, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979. The conference committee report accompanying the amendment explains that the "charge" requirement "is not a jurisdiction prerequisite to maintaining an action under the ADEA and therefore equitable modification for failure to file within the time period will be available to plaintiffs..." H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 7, 12, reprinted in [1978] U.S.Code Cong. & Admin.News, pp. 504, 528, 534; Coke v. General Adjustment Bureau, Inc., 616 F.2d 785, 789, f.3 (5th Cir. 1980).

In Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), affirmed per curiam by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 370 (1977), the Court determined

§626(d)(1)'s time limitation should be treated as analogous to a statute of limitations. (Supra, p.1260)

It is apparent from the documentary evidence introduced at the December 18 hearing, plaintiff's age discrimination charge was not filed until January 7, 1980, almost one year after the alleged discriminatory act. (Defendant's Exhibit 1)

In Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980) the Tenth Circuit reiterated the Dartt holding, supra "[t]hat the requirement in the Age Discrimination in Employment Act that an employee must file a notice of intent to sue within 180 days after the alleged unlawful practice is subject to possible tolling." In Larson v. American Wheel and Brake, Inc., 610 F.2d 506, 510-511 (8th Cir. 1979), the Court noted the following would provide a basis for the tolling of the period, i.e. (1) that his employer failed to post the appropriate notices concerning age discrimination as required by §627 of the Act; (2) that he was misled by the Department of Labor concerning the filing of his complaint; (3) that he was unaware of the facts that would give rise to his cause of action under the Act; (4) that he filed a state age discrimination suit thus giving notice to his employer; and (5) that affirmative conduct of the employer provides a basis for the tolling. At the December 18 hearing, plaintiff's counsel stated if plaintiff had been present, he would have testified he was not aware the alleged discriminatory acts constituted a violation of the Age Discrimination in Employment Act. It was admitted plaintiff was in effect contending he was ignorant of the applicable law. In Larson v. American Wheel and Brake, Inc., supra, the Court found "[t]hat ignorance of legal rights does not toll a statute of limitations. See also Quina v. Owens-Corning Fiberglas Corp., 575 F.2d 1115, 1118 (5th Cir. 1978); Fulton v. NCR Corp., 574 F.Supp. 377, 383 (USDC WD Va. 1979).

There is no evidence in the record before the Court to serve as a basis for equitably tolling the limitation period provided in the ADEA.

Moreover, plaintiff cannot come within 29 U.S.C. §692(d)(2) which extends the limitation period for federal filing to 300 days because a requirement is that the state have an age discrimination statute. The State of Oklahoma does have an employment discrimination law, 25 O.S.Cumm.Ann.Supp. §1301, on the basis of color, religion, sex or national origin, but does not have an age discrimination statute.

The Court, therefore, finds plaintiff's action for age discrimination is barred by the statute of limitations and defendant's Motion to Dismiss the age discrimination claim should be sustained.

IT IS, THEREFORE, ORDERED the defendant's Motion to Dismiss is sustained and the Complaint is dismissed.

ENTERED this 22nd day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 19 1980

Jack C. Silver, Clerk
U.S. District Court

INTERNATIONAL JOHNS-MANVILLE CORPORATION, a Delaware Corporation, Plaintiff, vs. S. L. INDUSTRIES, INC., a Connecticut Corporation, and SEAMLESS PIPELINE COATINGS, INC., a Connecticut Corporation, Defendants.	No. 78-C-603-E

JUDGMENT BY DEFAULT AGAINST
SEAMLESS PIPELINE COATINGS, INC.,
A CONNECTICUT CORPORATION

NOW this 19th day of January, 1980, there comes on for hearing the Plaintiff's application for judgment. The Plaintiff appears by James C. Lang of Sneed, Lang, Adams, Hamilton, Downie & Barnett, and the Defendant, Seamless Pipeline Coatings, Inc., a Connecticut corporation, appears not. The Court finds that the Defendant, Seamless Pipeline Coatings, Inc., a Connecticut corporation, having been regularly served with a summons and complaint, and having failed to appear pro se or by counsel at the pre-trial conference on December 1, 1980, after having had ample notice as provided by law, is presently in default; the Court further finds that the Defendant has failed to otherwise defend this action as provided by Rule 55 of the Federal Rules of Civil Procedure; the Court further finds that the Defendant is neither an infant nor incomptent and has been served with written notice of the application for judgment at least three (3) days prior to this hearing.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, International Johns-Manville Corporation, a Delaware corporation, have and recover from Defendant, Seamless Pipeline

Coatings, Inc., a Connecticut corporation, the sum of $200,000.00, with interest thereon at the rate of 10% from the date hereof, until paid, together with Plaintiff's costs and disbursements included in this action, amounting to the sum of $1,500.00, and that Plaintiff have execution therefor.

JUDGMENT RENDERED THIS 19th day of December, 1980.

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

I, James C. Lang, do hereby certify that on the 19th day of December, 1980, I served the Clerk of the United States District Court for the Northern District of Oklahoma with a copy of the foregoing instrument.

James C. Lang

FILED

DEC 19 1978

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MAX G. EPPS and PATRICIA R. EPPS, Plaintiffs	)	
v.	)	CIVIL NO. 78-C-626-C
UNITED STATES OF AMERICA, Defendant	)	

S T I P U L A T I O N

It is hereby stipulated and agreed that the complaint be dismissed with prejudice, the parties to bear their respective costs.

E. JOHN EAGLETON
Houston & Klein, Inc.
Sooner Federal Building
404 South Boston Avenue
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFFS

STEVEN SHAPIRO
Tax Division
Department of Justice
Washington, D. C. 20530

ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

SMITHWOOD, INC., a foreign corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-634-~~C~~ B
DALE CARTER LUMBER COMPANY, an Oklahoma corporation, and TULSA FABRICATORS & DISTRIBUTORS COMPANY, a Division of Dale Carter Lumber Company a/k/a T-FAB,	)	
Defendants.	)	

Notice OF

D I S M I S S A L

COMES NOW the Plaintiff, Smithwood, Inc., and hereby dismisses the above styled cause of action without prejudice.

Dated this 18th day of December, 1980.

HALL, ESTILL, HARDWICK, GABLE,
COLLINGSWORTH & NELSON

By Frank M. Hagedorn
Frank M. Hagedorn
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172
918/588-2659

Attorney for Plaintiff

CERTIFICATE OF MAILING

I, Frank M. Hagedorn, do hereby certify that a true and correct copy of the above and foregoing Dismissal was mailed with proper postage fully affixed thereon to Mr. Jim Kincaid, 2400 First National Tower, Tulsa, Oklahoma on this 18th day of December, 1980.

Frank M. Hagedorn
Frank M. Hagedorn

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT EARL JOHNSON,

Petitioner,

vs.

No. 80-C-508-E

A. I. MURPHY, Warden, Oklahoma State Penitentiary, and THE ATTORNEY GENERAL for the State of Oklahoma,

Respondents.

O R D E R

The Court now has before it for consideration Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254.

Petitioner alleges that pursuant to a plea bargain, Petitioner entered a plea of nolo contendere with the understanding that he would be given a polygraph test; if he passed the test, he alleges, he was to be allowed to withdraw his plea, and the charges against him were to be dismissed. On the other hand, it is alleged, if the polygraph tests were negative, Petitioner was to be sentenced to a term of 10 years.

Petitioner further alleges that as part of the agreement, his attorney was to be present.

It is Petitioner's present contention that his attorney was denied entry to the examination room, thereby creating a breach by the State of the plea agreement entered into. Petitioner was given the test, the results of which were adverse to him. Subsequently, in Case No. CRF-76-3168, in the District Court of Tulsa County, Petitioner was sentenced to a term of 10 years imprisonment for the crime of Larceny of Merchandise From a Retailer, A.F.C.F.

It is the State's position herein that the issues raised by Petitioner in this proceeding have previously been adjudicated on the merits in a prior habeas corpus action, making the instant Petition a successive Petition under Rule 9(b), Rules Governing Section 2254 Cases.

A review by the Court of the Petition filed in this case, and a comparison of it with the Petition filed in Johnson v. State of Oklahoma, Case No. 77-C-492-C (N.D. Okla.) convinces the Court that this is a successive petition as contemplated by Rule 9(b).

Petitioner alleges the same basic ground, the exclusion of his counsel from the actual test room; no substantially new and different allegations are made. Petitioner's earlier Petition, in Case No. 77-C-492-C, was denied on June 15, 1978, and the Judgment Denying the Petition was affirmed by the Court of Appeals on March 1, 1979, Case No. 78-1572.

Dismissal of this Petition pursuant to Rule 9(b) is, in the Court's opinion, warranted under the circumstances of this case.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus be, and the same hereby is, dismissed.

It is so Ordered this 16th day of December, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIP FOODS, INC., a Washington corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-364-E
V.I.P. FOOD PRODUCTS, a Delaware corporation; and L. D. JONES COMPANY, an Oklahoma corporation,	)	
Defendants.	)	

ORDER

The Court has before it issues raised by the parties resulting from a hearing on July 11, 1980. The parties have both filed memoranda in support of their respective issues and this Court hereby orders the following:

1. Defendants, their successors, assigns or affiliates, shall not use the term "V.I.P." or similar term as a trademark or trade name in connection with food products, with the exception of the following:

A. Defendants are permitted until December 31, 1980, to sell the inventory of food products set forth in Plaintiff's interrogatory 1, except the Bleu Cheese Croutons.

B. Defendants are permitted until December 31, 1981, to sell the crouton inventory set forth in Plaintiff's interrogatory 1.

2. Defendants, their successors, assigns, or affiliates, henceforth will no longer manufacture, or cause to be manufactured, any food products with the "V.I.P." mark or "V.I.P." trade name thereon.

3. The term "REESE" is not a term similar to "V.I.P." or "VIP".

4. Each party shall bear its own costs, expenses and attorneys' fees.

THEREFORE, IT IS THE ORDER OF THIS COURT That the parties

shall follow the terms of the above Order, having agreed to terminate this action once these remaining issues were resolved.

It is so Ordered this 15th day of December, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STEVEN L. WOODARD and SUSAN K. WOODARD,	)	CIVIL NO. 80-C-513-E
	)	
	)	
Defendants.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 11th day of December, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 15 1980

U. S. DISTRICT COURT

DAVID O. NORVELL,

Plaintiff,

vs.

SYS MANUFACTURING CO., d/b/a SYSTEMS MANUFACTURING CO., a foreign corporation,

Defendant.

No. 80-C-154-E

O R D E R

The Court has before it for consideration Defendant's Motion to Reconsider Order of Remand filed November 17, 1980, pursuant to Rule 59(a) Fed.R.Civ.Pro. The Defendant filed a brief in support of its motion. The Plaintiff filed a response to Defendant's motion. The Court has reviewed the files, the briefs and the applicable authorities and stands upon its order of remand entered November 17, 1980. The misnomer in the Defendant's name in the complaint did not affect the fact that diversity jurisdiction was clear from the original petition.

IT IS THEREFORE THE ORDER OF THIS COURT That Defendant's Motion to Reconsider Order of Remand be and the same is hereby denied.

It is so Ordered this 15th day of December, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

RICHARD L. HUDSON, Plaintiff	)	
vs.	)	No. 75-C-151-C
SWAN ENGINEERING AND SUPPLY COMPANY, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

NOW on this 13th day of November, 1980, pursuant to regular setting there came on for hearing, the evidentuary hearing on attorney's fees.

The Court, after having examined the file, examined the affidavits that had previously been filed herein, having considered the briefs submitted by the parties, and further having heard testimony offered by the Plaintiff finds that a reasonable attorney's fee for the services rendered in this case is Seventy-Five Thousand Dollars ($75,000.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant pay to the Plaintiff the sum of Seventy-Five Thousand Dollars ($75,000.00), the same representing a reasonable attorney's fee in this matter.

DATED this 12th day of ~~November~~ December, 1980.

/s/ H. Dale Cook
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

Attorney for Plaintiff

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM R. COLL,

Plaintiff,

vs.

THE CITY OF CLAREMORE, a municipal corporation; MARGARET ROBERTSON, individually, and in her capacity as City Clerk for the City of Claremore; HARRY POWERS, individually and in his capacity as Mayor of the City of Claremore; and FIRST BANK IN CLAREMORE, formerly d/b/a First National Bank of Claremore,

Defendants.

No. 80-C-399-Bt

O R D E R

The defendant, First Bank in Claremore, formerly d/b/a First National Bank of Claremore ("Bank") has moved to dismiss plaintiff's cause of action, pursuant to Rule 12(b)(6), F.R.Civ.P., for failure to state a claim. Four propositions in support of the Motion are presented by the defendant Bank, i.e.,

(i) The Doctrine of Respondeat Superior is inapplicable to actions brought under 42 U.S.C. §1983;

(ii) The plaintiff's complaint contains only conclusory allegations regarding conspiracy;

(iii) 42 U.S.C. §1983 does not authorize a cause of action for conspiracy to deny due process; and

(iv) 15 U.S.C. §1673 et seq established no independent basis for federal jurisdiction.

Plaintiff's complaint contains three causes of action. The First Cause of Action is directed solely at the City of Claremore based on its actions in terminating plaintiff from employment. Plaintiff alleges jurisdiction under 42 U.S.C. §1983. The Second Cause of Action is directed against the City of Claremore, Margaret Robertson, individually and in

her capacity as City Clerk, and Harry Powers, individually and in his capacity as Mayor, for withholding sums from plaintiff's wages in excess of the limits provided by Title 15 U.S.C. §1673. In the Third Cause of Action plaintiff alleges the defendant Bank, through its agent, Richard L. Peaster [attorney], conspired with the Mayor of the City of Claremore to withhold wages of plaintiff which were in excess of amounts allowed by 15 U.S.C. §1673. Plaintiff alleges the Mayor and Bank violated 15 U.S.C. §1673 and also the due process standards guaranteed by 42 U.S.C. §1983. Plaintiff further states the Bank, through its agent, served garnishment summons by its attorney rather than through the Sheriff or by certified mail from the Court Clerk, in violation of 12 O.S.A. §153.1(a) and 12 O.S.A. §1193. Plaintiff alleges defendant Bank collected $158.87 more than it was entitled to under its judgment against plaintiff in a State Court action and seeks judgment in the amount of $158.87, attorney fees and costs. Plaintiff also seeks punitive damages in the sum of $100,000.00. Plaintiff alleges he invokes jurisdiction as to the Third Cause of Action pursuant to the provisions of 42 U.S.C. §1983 and defendants' violation of 15 U.S.C. §1673.

Plaintiff's allegation that jurisdiction is founded upon the existence of a question arising under 42 U.S.C. §1983 is technically defective in that §1983 does not grant jurisdiction but serves to protect against deprivation of vested, constitutional or legislative rights. However, Federal Courts have jurisdiction over claims for redress of deprivation of rights under §1983 pursuant to 28 U.S.C.§1343. 28 U.S.C. §1653 provides that defective allegations of jurisdiction may be amended in the trial court. The Court will treat the Third Cause of Action at this time as having been amended to contain

a statement that the Court's jurisdiction as to the Section 1983 claim depends on 28 U.S.C. §1343 as required by Rule 8(a)(1), F.R.Civ.P. Weaver v. Haworth, 410 F.Supp. 1032 (USDC ED Okl. 1975).

For the purposes of a 12(b)(6) motion, the allegations of the complaint are taken at face value and construed most favorably to the pleader. A motion to dismiss must not be granted "unless it appears beyond doubt" that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Lessman v. McCormick, 591 F.2d 605, 607-608 (10th Cir. 1970); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

Section 1983 has its roots in §1 of the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, §1, 17 Stat. 13, and its primary purpose is to "enforce the provisions of the Fourteenth Amendment." District of Columbia v. Carter, 409 U.S. 418, 423, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

To state a claim under 42 U.S.C. §1983 a plaintiff must allege (1) the defendant was acting under color of state law at the time the acts complained of were committed, and that (2) the defendant deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. Norton v. Liddel, 620 F.2d 1375, 1379 (10th Cir. 1980); Briley v. State of Cal., 564 F.2d 840, 853 (9th Cir. 1977); Stene v. Berseford Sch. Dist., No. 61-2, 425 F. Supp. 1389 (USDC S.Dak. 1977); Adickes v. S.H.Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1974). See also: Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); Clappier v. Flynn, 605 F.2d 519 (10th

Cir. 1979); Lessman v. McCormick, supra, 591 F.2d 605.

Plaintiff's §1983 claim against the defendant Mayor and defendant Bank is viable only if the bank was conspiring with the Mayor, for only then would the Bank have been acting under color of state law. Private individuals may act under color of state law if they conspire jointly with a state official to deprive a plaintiff of his constitutional rights. Dennis v. Sparks, 49 LW 4001 (U.S.Supreme Court, No. 79-1186, Nov. 8, 1980); Adickes v. S. H. Kress & Co., supra, 398 U.S. 144; Board of Education of Independent School District Number 53 of Oklahoma County, Oklahoma v. Board of Education of Independent School District Number 52 of Oklahoma County, Oklahoma, 522 F.2d 730 (10th Cir. 1976); Norton v. Liddel, supra, 620 F.2d 1375, 1381.

In United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966) it was said:

> "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

The defendant Bank's contention 42 U.S.C. §1983 does not authorize a cause of action for conspiracy to deny due process is inaccurate. A §1983 cause of action based on conspiracy alone is precluded. Jennings v. Nester, 217 F.2d 153 (7th Cir. 1954); Eagan v. City of Aurora, 291 F.2d 706 (7th Cir.1961). In Adickes v. S.H.Kress & Co., supra, 398 U.S. 144, the Supreme Court held the conspiracy element can only serve to satisfy the "under color of state law" requirement. The gist of the cause of action is the deprivation and not the conspiracy. Lesser v. Braniff Airways, Inc., 518 F.2d 538, 540, f.2 (7th Cir. 1975).

Even though plaintiff's cause of action is one for a deprivation, and not conspiracy, he must sufficiently plead the allegations of the conspiracy to withstand the defendant Bank's Motion to Dismiss.

Rule 8(a)(s), F.R.Civ.P. requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." It is well settled, however, conclusory allegations of conspiracy are insufficient to state a cognizable claim. Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977), cert. den. 434 U.S. 1088, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); Ludwin v. City of Cambridge, 592 F.2d 606, 610 (1st Cir. 1979). In his responsive brief plaintiff states he "must have the benefit of discovery, which he is diligently pursuing in order to state all the facts supporting a conspiracy." In his complaint plaintiff only alleges from April 12, 1978 through October 19, 1978, defendant Bank, by its agent, and defendant Mayor conspired to withhold wages of plaintiff in excess of that allowed by 15 U.S.C. §1673 and in violation of the due process standards guaranteed the plaintiff by 42 U.S.C. §1983. Plaintiff has alleged only conclusory allegations of conspiracy, but had not supported his claim with references to material facts. Slotnick v. Staviskey, supra, 560 F.2d 31, 33.

The Court determines that a claim is not stated upon which relief can be granted pursuant to 42 U.S.C. §1983. Moreover, there is merit to the defendant Bank's contention it cannot be held liable vicariously for the conduct of its agent under the doctrine of respondeat superior. Where monetary damages are sought under the provisions of the Civil Rights Act the doctrine of respondeat superior does not apply; personal involvement of the defendant bank is required. Herbst v. International Tel. & Tel. Corp., 72 F.R.D. 84 (USDC ED Tenn. 1976); Moore v. Buckles, 404 F.Supp. 1382, 1384 (USDC Tenn. 1975); Draeger v. Grand Central, Inc., 504 F.2d 142 (10th Cir. 1974). However, in 1976, the Supreme Court of the United States decided the case of Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) and noted the "causation requirement" when it found the Mayor, the Police Commissioner, and other high officials of

Philadelphia not liable under Section 1983 because there was no "affirmative link" between the misconduct complained of and any action by the officials. The Tenth Circuit Court of Appeals applied the Rizzo decision in Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976), in stating:

> "The 'affirmative link' requirement of Rizzo means to us that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made.
>
> * * * *
>
> "Nothing in the record shows that any defendant instigated the investigation of plaintiff, directed its course, participated or acquiesced therein.... In sum, plaintiff failed to establish the 'affirmative link' which Rizzo requires."

See also McClelland v. Facteau, 610 F.2d 693, 696 (10th Cir. 1979), Rehrg. den. 1980.

Plaintiff, in the instant case, has not met the "affirmative link" requirement of Rizzo, supra.

Plaintiff relies on Maple v. Citizens Nat. Bank & Trust Co., 437 F.Supp. 66 (USDC WD Okl. 1977), in support of its position that the Consumer Credit Protection Act, Subchapter II, 15 U.S.C. §1671 et seq., gives rise to a private cause of action. The Court in this case relied on the decision of the Ninth Circuit Court of Appeals in Stewart v. Travelers Corporation, 503 F.2d 108 (9th Cir. 1974). In both of these cases, plaintiff sought relief under 15 U.S.C. §1674(a) which forbids the discharge of an employee due to the garnishment of his wages for one indebtedness. Plaintiff claims 15 U.S.C. §1673 dealing with restrictions on amounts of wages to be garnisheed should also give rise to a private cause of action.

In a well reasoned opinion, the Fifth Circuit Court of Appeals has recently considered a private cause of action under 15 U.S.C. 1674(a) in Smith v. Cotton Bros. Baking Co., Inc., 609 F.2d 738 (5th Cir. 1980) cert. requested Arpil 8, 1980, No. 79-1570, cert.den. October 7, 1980, 49 LW 3232.

The Court noted the Supreme Court has not spoken definitely on the issue, but that district courts from Louisiana, Iowa, Kansas and West Virginia have ruled no private right of action exists. See Western v. Hodgson, 359 F.Supp. 194 (USDC SD W.Va. 1973), aff'd on other grounds, 494 F.2d 379 (4th Cir. 1974); Simpson v. Sperry Rand Corp., 350 F.Supp. 1057 (USDC WD La. 1972), vacated and remanded on other grounds, 488 F.2d 450 (5th Cir. 1973) (per curiam); Oldham v. Oldham, 337 F.Supp. 1039 (USDC ND Iowa 1972); Higgins v. Wilkerson, 63 Lab. Cas. ¶32,379 (USDC Kan.1970).

In the Smith case, supra, at page 742 the Court said:

> "Our inspection of the legislative history reveals no specific congressional intent to vest in discharged employees any federal right to damages for unlawful discharge under §1674(a). 'True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.' Cort v. Ash, supra, 422 U.S. at 82, 95 S.Ct. at 2090 (footnote omitted). An explicit purpose to deny a private cause of action does not appear in the legislative history; however, we take note of the statement of the Committee on Baking and Currency that '[e]nforcement of these provisions [in Subchapter II] is vested in the Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor.' H.R.Rep. No. 1040, supra [1968] U.S.Code Cong. & Admin.News at 1978. Moreover, the statute expressly states that the 'Secretary of Labor...shall enforce the provisions of this subchapter.' 15 U.S.C. §1676. This would appear to be an implicit legislative manifestation to deny a private remedy.
>
> "The question of whether the implication of a private remedy is consistent with the underlying purposes of the legislative scheme is less apparent. Clearly, the purpose of the particular section under which plaintiff brought his action is to prevent emeployee discharge when that discharge is based solely on a garnishment for one single indebtedness. However, on that basis alone, we cannot say that a private remedy for such an unlawful discharge is implicit in the whole scheme. All three subchapters of the CCPA provide for private civil remedies for noncompliance in addition to the primary administrative remedies. Moreover, those actions are limited in scope and application to their own respective subchapters. See Oldham v. Oldham, 337 F.Supp. 1039 (N.D. Iowa 1972)."

This Court is persuaded by the rationale of Smith v. Cotton Bros. Baking Co., supra, 609 F.2d 738, and finds no private cause of action arises under 15 U.S.C. §1673.

The Court, therefore, finds the Motion to Dismiss of First Bank in Claremore, formerly d/b/a First National Bank of Claremore should be sustained for failure to state a claim. Should a cause of action exist in favor of plaintiff and against the defendant Bank, it would sound in an available common law or State remedy.

IT IS THEREFORE ORDERED the Motion to Dismiss of First Bank in Claremore, formerly d/b/a First National Bank of Claremore, is sustained.

ENTERED this 12th day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 11 1980

MARGARET ANN HARDEN,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 80-C-93-E
	)	
PRUDENTIAL INSURANCE COMPANY OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

On this 11th day of Dec., 1980, upon written application of the parties for an order of dismissal with prejudice of the complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the complaint and have requested the Court to dismiss the complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said complaint should be dismissed.

IT IS THERFORE, ORDERED, ADJUDGED AND DECREED by the Court that the complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same are hereby dismissed with prejudice to any further action.

S/ JAMES O. ELLISON

James O. Ellison
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOME INDEMNITY COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	No. 76-C-576-BT
CREEK COUNTY RURAL WATER DISTRICT NO. 1 AND I.J. BRASHEARS,	)	
Defendants.	)	

J U D G M E N T

Based on the Findings of Fact and Conclusions of Law filed simultaneously with this Judgment, IT IS ORDERED judgment be entered in favor of the plaintiff, Home Indemnity Company, and against the defendants, Creek County Rural Water District No. 1 and I. J. "Dutch" Brashears, declaring and finding the activities of said Rural Water District come within the exclusions of the policy of insurance issued by the plaintiff and further finding the plaintiff is not obligated to furnish a defense to said Water District in the litigation presently pending in the District Court of Creek County, Oklahoma.

ENTERED this 11th day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOME INDEMNITY COMPANY, a corporation, Plaintiff,	)	
vs.	)	No. 76-C-576-BT
CREEK COUNTY RURAL WATER DISTRICT NO. 1 AND I.J. BRASHEARS, Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action involves a declaration of the rights and liabilities of plaintiff and defendants as to the interpretation of an insurance policy issued by the plaintiff.

The parties have agreed to submit this matter for determination by the Court on stipulation of facts; depositions of Bill Warden, District Sanitarian, State Department of Health, and Curtis E. Moutrey, Private Consultant, Water and Sewage Industrial Wastes; and briefs.

FINDINGS OF FACT

1. On or about April 27, 1973, plaintiff issued to the defendant, Creek County Rural Water District No. 1, a policy of insurance. This policy provided the general liability section was limited by any applicable exclusions. (Stipulated) The insurance policy contains the following exclusion:

> "It is agreed that this policy does not apply under Section 2 to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminates or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is neither expected nor intended by the insured."

2. On December 31, 1975, I.J. "Dutch" Brashears, filed a lawsuit in the District Court of Creek County, Oklahoma against Creek County Rural Water District No. 1, alleging damage to real property in the amount of $30,000.00, and

alleging that said Water District "has polluted said creek with silt and other chemicals from the treatment plant." Thereafter, I. J. "Dutch" Brashears amended his petition and struck the words "and other chemicals." Mr. Brashears' cause of action, therefore, is for damages caused by silt being deposited on his land. (Stipulated)

3. When a water plant treats water, it extracts mostly diatoms and colloidal clay, which form a floc in the inner workings of the plant. (Warden Depo. 7) Diatoms are a creature of the algae family. (Warden Depo.24) They are not toxic, alkaline, nor acid. (Warden Depo. 25; Moutrey Depo.18) Colloidal clay is silt and dirt. (Warden Depo. 24) The floc is made to adhere to itself so that it gets heavy enough to settle out, taking out the impurities in the water. This is called "sludge." (Warden Depo. 7).

4. Prior to and during the year 1975, Creek County Rural Water District was using the chemicals or alum and lime in their water treatment process. (Stipulated) Alum and lime are added to make molecules in water [foreign or suspended substances] adhere to each other. (Warden Depo.8).

5. The water treatment process caused the diatoms, collodial clays and algae, hereinafter referred to as silt and sludge, in the water treated to settle out in a 35' by 70' sludge retention basin. This basin would become full of the silt and sludge at which time it would be flushed into Polecat Creek. (Stipulated)

6. The source of the water treated by the Water District is Heyburn Lake, the dam of which is across Polecat Creek. The raw water in Heyburn Lake contains aluminum and phosphate. (Stipulated)

7. The procedure at the water plant for treating the water was as follows: First, the water went through a flocculation process where the sludge or suspended particles were allowed to settle out through the use of alum and other chemicals. The top water was then run through a sand filter which took out any additional suspended solids. The sand filters were backwashed to clean

them after each run. The backwashed materials, as well as the solids that were settled in the flocculation process went into the sludge basin. The water is supposed to stand in the sludge basin a sufficient period of time to allow the sludge to settle out of the water. (Warden Depo.10-13) All sludge accumulated in the sludge basin would be flushed into the Polecat Creek. (Warden Depo.13) The water in the sludge basin was waste water and not retrievable.

8. The Creek County Rural Water District, in the year 1975, had a permit from the Oklahoma State Department of Health which granted it the right to process water and also the right to dispose of the silt or sludge. (Stipulated)

9. In 1975, Creek County Rural Water District No. 1 applied to the Environmental Protection Agency in compliance with the provisions of the Federal Water Pollution Control Act, for authorization to discharge under the National Pollutant Discharge Elimination System. The application was approved and the defendant was issued a permit with discharge limitations on suspended solids limiting the daily average to 20 milligrams per liter and the daily maximum to 30 milligrams per liter. (Stipulated)

10. The discharge water from the water treatment sludge basin is "most likely exactly the same chemically as already in the creek, with the exceptions of concentration." Concentrations would be higher coming out of the water treatment plant. (Warden Depo. 29).

11. If the storage basin or sludge basin was allowed to set and decant, as it was designed, the discharge of the water into the receiving stream would be better than the water that is in the stream. It would be drinking water for humans. If the sludge basin was overflowing as it generally was, the discharge into the water would be a heavy concentration of sludge; however, it would not appreciably affect the water, because of the dilution factor. (Warden Depo. 30).

12. Polecat Creek has its source in Heyburn Lake. Colloidal clay and diatoms are found in Heyburn Lake and are, therefore, in the creek naturally. The only way the colloidal clay and diatoms would be a contaminant would be in the terms of greater concentrations. (Warden Depo. 32)

13. The increase in concentration is a physical alteration of the previous condition of the water, subject to dilution. (Warden Depo. 34-35)

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the subject matter and the parties. 28 U.S.C. §1332.

2. This is a declaratory judgment to determine coverage of an insurance policy, and specifically whether the material discharged by the defendant, Creek County Rural Water District No. 1, was waste material or other irritants, contaminants or pollutants as defined in the policy of insurance. (Pre-Trial Order).

3. Generally, the terms of an insurance policy must be considered not in a technical but in a popular sense, and they should be construed according to their plain, ordinary and accepted use in common speech, unless it affirmatively appears that a different meaning was intended. National Aviation Underwriters v. Altus Flying, 555 F.2d 778, 782 (10th Cir. 1977).

4. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. 12 O.S. §161; National Aviation Underwriters v. Altus Flying, supra; Cities Service Oil Co. v. Geolograph Co., 208 Okl. 179, 254 P.2d 775, 780.

5. As an aid in interpreting the exclusion in the policy of insurance, the Court will reconsider legislative enactments by the State of Oklahoma and the United States of America.

6. Title 82 O.S.A.Supp. §926.1 defines pollution and wastes as follows:

> "Wherever used in this act the following terms shall have the respective meanings hereinafter set forth or indicated, unless the context otherwise requires:
>
> 1. 'Pollution' means contamination or other alteration of the physical, chemical or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.
>
> 2. 'Wastes' means industrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the state."

7. The Federal Water Pollution Control Act, as amended by the Clear Water Act of 1977, 33 U.S.C. §1362, broadly defines "pollutant" as follows:

> "(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. * * *"

8. In Minnehaha Creek Watershed Dist. v. Hoffman. 597 F.2d 617, 626-627 (8th Cir. 1979), the Court found no justification under the Federal Act for a conclusion that a significant alteration in water quality must be demonstrated before the addition of a particular substance could be classified as the discharge of a pollutant.

9. In South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118, 125-126 (USDC S.Car. 1978), the Court said:

> "The question thus becomes whether or not the release of this water into the Savannah River will constitute an 'addition' of a pollutant.... However, defendants strongly urge that there will be no 'addition' of a pollutant into the Savannah River because nothing is added to the water in the reservoir. They contend that the

"lower dissolved oxygen content and higher metallic content would result from 'a natural process occurring in a water body and would not be based upon activity of the defendants.' According to plaintiffs' factual allegations, ..., defendants' contention that the change in the water quality is a natural process not based upon defendants' activities is inaccurate. According to plaintiffs, the water that enters the reservoir will be high in dissolved oxygen and low in metals. It is only by the impoundment of the water that these changes occur. This impoundment certainly is not a natural condition and will result solely from the operation of the dam for which defendants are allegedly responsible."

10. When the Rural Water District separated and processed the water in its treatment plant, the induction of the residue constituted activity specifically excluded by the terms of the insurance contract. The reintroduction of the materials in a concentrated form sufficient to be detrimental to riparian owners would constitute a pollutant under the exclusion clause.

11. Based on the foregoing Findings of Fact and Conclusions of Law, judgment will be entered in favor of the plaintiff, the Court having concluded the activities of Creek County Rural Water District No. 1 come within the subject exclusion of the policy of insurance and further finding the plaintiff is not obligated to furnish a defense to said water district in the litigation presently pending in the District Court of Creek County, Oklahoma.

ENTERED this 12 day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 1 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

BOBBY THARP and SHIRLEY CATTELL, Individually and on Behalf of the Estate of KAREN THARP, Deceased,

Plaintiffs,

v.

THOMAS A. DODSON, M.D. MARILYN LINS, M.D., and HILLCREST MEDICAL CENTER,

Defendants.

No. 79 C 503 E

ORDER OF DISMISSAL

NOW ON this 11th day of Dec., 1980, upon the plaintiff's application for Order of Dismissal, the Court finds that the same should be granted and therefore dismisses the above captioned cause with prejudice to the filing of any future action.

Thomas R. Brett
The Honorable Thomas R. Brett

APPROVED AS TO FORM:

Larry Hayes
Attorney for the Plaintiffs

W. Michael Hill
Attorney for the Hospital

Joseph M Best
Attorney for the Defendant Doctors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA BY RAY MARSHALL, Secretary of Labor, United States Department of Labor, Plaintiff, v. HENRY PARKER, an Individual, Defendant.	)	Civil Action File No. 80-C-111-E

ORDER OF DISMISSAL

The plaintiff having moved that the above entitled action be dismissed, it is:

ORDERED, ADJUDGED, and DECREED that the above styled and numbered cause be, and it hereby is, dismissed without prejudice.

Dated this 10th day of December, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

Approved:

MARIGNY A. LANIER
Attorney for Plaintiff

OSHA Inspection No. K0698-681
SOL Case No. 11767 (AFW)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 10 1980

UNITED STATES OF AMERICA, Plaintiff, vs. DEBORAH GOODMAN, Defendant.	)	CIVIL ACTION NO. 80-C-327-E

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of December, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Deborah Goodman, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Deborah Goodman, was personally served with Summons and Complaint on June 12, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Deborah Goodman, for the principal sum of $567.31 plus the accrued interest of $28.72 as of March 10, 1980 (less the sum of $300.00 which has been paid), plus interest at 7% from March 10, 1980 until the date of Judgment, plus interest at the legal rate on the principal sum of $567.31 (less the sum of $300.00 which has been paid) from the date of Judgment until paid.

James O. Ellison
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 10 1980

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
ROBERT E. SMITH, Defendant.	)	CIVIL ACTION NO. 80-C-594-E

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of December, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Robert E. Smith, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Robert E. Smith was personally served with Summons and Complaint on October 24, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Robert E. Smith, for the principal sum of $30,000.00 plus the accrued interest of $1,763.61 as of September 28, 1978, plus interest at the daily accrual rate of $4.0081 from and after September 28, 1978, until the date of Judgment, plus interest at the legal rate on the principal sum of $30,000.00 from the date of Judgment until paid.

James O. Ellison
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DENNIS CREWS, #98336	)	
	)	
Plaintiff	)	RE: CIVIL ACTION NO. 80-C-509-E
	)	
vs.	)	
	)	
LINDA BARHAM, et al.,	)	
	)	
Defendant	)	

ORDER

This matter coming on for hearing from the 10th day of December, the Court finds that the Plaintiff, Dennis Crews, has filed with this Court a motion to dismiss the above styled action.

Wherefore this Court, upon motion by the Plaintiff, dismisses the above styled case against each and every Defendant without prejudice.

James O. Ellison
DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA A. YOUNG and COMMERCIAL UNION INSURANCE COMPANY,	)	
Plaintiffs,	)	
v.	)	No. 80-C-40-E
FARMERS INSURANCE GROUP,	)	
Defendant.	)	

ORDER OF DISMISSAL

NOW on this 10th day of December, 1980, a Stipulation for Dismissal having been filed jointly by Farmers Insurance Group and Commercial Union Assurance Company and the Court having reviewed the request, finds that it is reasonable and proper and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Commercial Union Assurance Company is dismissed from the lawsuit herein.

James O. Ellison
Judge of the United States
District Court for the
Northern District of
Oklahoma

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 1 1980

UNITED STATES OF AMERICA and VERNA JONES, Revenue Officer of the Internal Revenue Service,	)	
Petitioners,	)	
vs.	)	No. 80-C-354-E ✓
TROY N. GOFORTH,	)	
Respondent.	)	

O R D E R

This matter having come on for hearing on December 5, 1980, on petitioner's Petition to Enforce Internal Revenue Summons, filed June 24, 1980, and this Court's Order to Show Cause why said Internal Revenue Service summons should not be enforced, and petitioner being present and represented by Kenneth P. Snoke, Assistant United States Attorney, and respondent Troy N. Goforth being present with his attorney David E. Deatherage who announced that respondent did not contest the good faith of the subject summons, and was prepared to comply therewith, and the Court being fully advised in the premises, now therefore, it is

ORDERED, ADJUDGED and DECREED that petitioner's Petition to Enforce Internal Revenue Service Summons, is sustained and respondent is Ordered to comply forthwith with the Internal Revenue Service summons, originally served on him on March 25, 1980, a copy of which is attached to said Petition.

Dated this 10th day of December, 1980.

James O. Ellison

JAMES O. ELLISON
U. S. District Judge

5.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

J. DON FOSTER,

Plaintiff,

v.

Civil Action No. 77-C-465-F

UNITED STATES OF AMERICA,

Defendant.

FILED

DEC 1 1980

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon the filing of the Stipulation For Compromise Settlement Pursuant To 28 U.S.C. §2677 which has been executed by the attorneys for the plaintiff and the plaintiff, as well as the attorneys for the defendant, the United States of America, and after due consideration, it is hereby

ORDERED, as follows:

1. The settlement of this case as set out in the Stipulation For Compromise Settlement Pursuant To 28 U.S.C. §2677, is approved by the Court;

2. The above-captioned case will be dismissed with prejudice and without costs, and the case closed, upon the receipt of the checks by plaintiff and his counsel, as set out in the Stipulation For Compromise Settlement filed herein; and

3. In the event that the United States of America does not make payment as set out in the Stipulation For Compromise Settlement filed herein, by February 1, 1981, the plaintiff shall have the right to move the Court to reopen this civil action in the same posture as it was on the eve of trial.

DATED, at Denver, Colorado this 8 day of December, 1980.

BY THE COURT:

SHERMAN G. FINESILVER, JUDGE
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
Sitting by Designation

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FILED

DEC 10 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LILLARD G. STEARNS,

Defendant.

CIVIL ACTION NO. 80-C-614-B

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of December, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Lillard G. Stearns, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Lillard G. Stearns, was personally served with Summons and Complaint on November 1, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Lillard G. Stearns, for the principal sum of $2,316.60, plus interest at the legal rate from the date of this Judgment until paid.

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action No. 80-172

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION	
JAMES A. COBB, Plaintiff	ORDER DISMISSING CASE WITHOUT PREJUDICE
v.	
UNITED STATES OF AMERICA, Defendant	

DEC 10 1980

O R D E R

THIS MATTER comes before the Court upon the motion of plaintiff, James A. Cobb, to dismiss the action without prejudice. The motion is GRANTED.

IT IS ORDERED that the above-captioned action be, and hereby is, dismissed without prejudice.

DATED at Denver, Colorado, this 8 day of December, 1980.

BY THE COURT:

Sherman G. Finesilver

SHERMAN G. FINESILVER, Judge
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
SITTING BY DESIGNATION

9.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SERVICE DRILLING CO., Plaintiff,	)	
vs.	)	Civil Action No. 79-C-462-Bt
VENTURE INDUSTRIES, INC., Defendant.	)	

ORDER OF DISMISSAL
WITHOUT PREJUDICE

The parties having stipulated and agreed to the dismissal of the above civil action, without prejudice and with each party to bear its own costs;

IT IS THEREFORE ORDERED that this civil action is dismissed without prejudice, with each party to bear and pay its own costs herein incurred.

SO ORDERED this 9 day of Dec, 1980.

S/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOM BAKER, Plaintiff,	)	
-vs-	)	NO. 80-C-227-BT
BILLIARDS OF TULSA, INC., Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Following a hearing upon Defendant's Motion to Dismiss pursuant to Rule 41 (b) held before this Court on December 2, 1980, at 8:30 o'clock a.m., the Court finds:

That Plaintiff has failed to properly and diligently prosecute his action filed herein on April 25, 1980, and has further failed to comply with the Order of this Court entered following a pre-trial conference held on the 7th day of October, 1980.

IT IS, THEREFORE, ORDERED:

That Plaintiff's action is hereby dismissed with prejudice as an adjudication on the merits pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure, and the Plaintiff is hereby notified that from the date of the filing of this Order, he is allowed ten (10) days to file a Motion for New Trial and thirty (30) days to file a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit.

IT IS FURTHER ORDERED that Defendant's counsel this day serve a copy of this Order by United States Mail on the Plaintiff.

DATED this 4th day of December, 1980.

S/ THOMAS R. BRETT

THOMAS R. BRETT, JUDGE

Certificate of Mailing

The undersigned hereby certifies that on this ____ day of December, 1980, he placed in the United States Mail, postage prepaid, a true and correct copy of the above and foregoing Order addressed to Tom Baker, c/o Global Billiard Manufacturers, 13875 Artesia, Cerritos, California 90701.

Thomas S. Vandivort

THOMAS S. VANDIVORT

LAW OFFICES
ALLIS
&
VANDIVORT INC.
WELLINGTON SQ.
4150 S. 41ST ST.
TULSA OK 74105

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HONEYWELL, INC., a corporation,)
)
Plaintiff,)
)
vs.) No. 78-C-142-C
)
MILLER ELECTRIC SHOP, INC.,)
a corporation, FRITZ CONSTRUCTION)
COMPANY, INC., a corporation, and)
MID-CONTINENT CASUALTY COMPANY,)
a corporation,)
)
Defendants.)

AMENDED JUDGMENT

Pursuant to the Order entered simultaneously with this Amended Judgment, IT IS ORDERED the Judgment entered on September 29, 1980, in favor of the plaintiff, Honeywell, Inc., and against the defendants, Fritz Construction Company, Inc., and Mid-Continent Casualty Company, in the amount of $23,789.00 is vacated and set aside and Judgment is entered in favor of the defendants, Fritz Construction Company, Inc., and Mid-Continent Casualty Company, and against the plaintiff, Honeywell, Inc. Judgment is entered in favor of plaintiff, Honeywell, Inc., and against the defendant, Miller Electric Shop, Inc., for attorney fees in the amount of $17,712.00. The balance of the Judgment entered on September 29, 1980 is not amended and remains in full force and effect from the date Judgment was originally entered.

ENTERED this 9th day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HONEYWELL, INC., a corporation,

Plaintiff,

vs.

MILLER ELECTRIC SHOP, INC., a corporation, FRITZ CONSTRUCTION COMPANY, INC., a corporation, and MID-CONTINENT CASUALTY COMPANY, a corporation,

Defendants.

No. 78-C-142-C

ORDER

On September 29, 1980, this Court entered Findings of Fact and Conclusions of Law. A Judgment was entered the same date in favor of plaintiff, Honeywell, Inc., and against the defendants, Miller Electric Shop, Inc., Fritz Construction Company, Inc., and Mid-Continent Casualty Company in the amount of $23,789.00 and in favor of defendant, Miller Electric Shop, Inc., and against the plaintiff, Honeywell, Inc., in the sum of $1714.16.

The defendants, Mid-Continent Casualty Company and Fritz Construction Company, Inc., have filed a Motion for New Trial, alleging error on the part of the Court in failing to recognize the statute of limitations provided in 61 O.S.A. §2. The Court found in paragraph eleven of its Findings of Fact that the answers of Mid-Continent Casualty Company and Fritz Construction Company did not raise the defense of statute of limitations. The Court, in reviewing the file, finds it was in error and that Fritz Construction Company and Mid-Continent Casualty Company did in fact affirmatively raise the expiration of the applicable statute of limitations in their amended answers and in the pretrial order.

Title 61 O.S. §2 provides:

> "Such bond shall be filed in the office of the agency, institution, department, commission, municipality or government instrumentality that is authorized by law and does enter into contracts for the construction of public improvements or buildings, or repairs to the same;

"and the officer with whom the bond is filed shall furnish a copy thereof to any person claiming any rights thereunder. Any person to whom there is due any sum for labor, material or repair to machinery or equipment, furnished as stated in the preceding section, his heirs or assigns, may bring an action on said bond for the recovery of said indebtedness, provided that no action shall be brought on said bond after one (1) year from the day on which the last of the labor was performed or material or parts furnished for which such claim is made.

"Provided, however, that any person having direct contractual relationship with a subcontractor performing work on said contract, but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond only upon giving written notice to said contractor and surety on said payment bond within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or parts for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or parts were furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, together with a copy thereof to the surety or sureties on said payment bond."

At the trial of this case, plaintiff introduced its Exhibit 11, which is a copy of a letter dated November 4, 1976, to Fritz Construction Company, wherein plaintiff advised the Fritz Construction Company it was an unpaid subcontractor of Miller Electric Shop, Inc., on the Eastern State Hospital project. Attached to said letter is a copy of an invoice dated November 4, 1976. It appears on the face of the invoice the last material furnished by Honeywell, Inc., was on September 15, 1976. This action was commenced on March 30, 1978. Miller Electric Shop, Inc., made payments to plaintiff from May 8, 1975 through June 28, 1977. No further payments were made by Miller Electric until January 25, 1978, when $400.00 was paid and February 9, 1978 when $500.00 was paid. The invoice of plaintiff reflects a balance due and owing after the February 8, 1978 payment of $23,789.00. (Plaintiff's Exhibit 10).

It is plaintiff's position Miller's partial payments of the indebtedness, the last installment being paid on February 9, 1978, tolled the statute of limitations, relying on 12 O.S.A. §101, which provides:

> "In any case founded on contract, when any part of the principal or interest shall have been paid....an action may be brought in such case within the period prescribed for the same, after such payment...."

Plaintiff contends its action was instituted within one year from the date of the last payment by Miller.

Plaintiff further contends the Court found plaintiff had not yet furnished some of the materials for which claim is made in this suit and granted judgment in the amount of $1,714.16 in favor of Miller Electric Shop and against Honeywell. Plaintiff asserts, therefore, it cannot be said the materials for which claim is made were last furnished by the plaintiff more than one year prior to the commencement of suit.

The limitation statute relied on by plaintiff [12 O.S.A. §101], although applicable to Miller Electric, is not applicable to Mid-Continent Casualty Company and Fritz Construction Company. It is a settled rule of statutory construction that a special statute making a specific requirement controls over a general statute. Brice v. Seebeck, 595 P.2d 441, 442 f.1 (Okl. 1979); Citizens' Action for Safe Energy v. Okl. Water Res., 598 P.2d 271, 273 (Okl.App.1979); Glover Const. Co. v. Andrus, 591 F.2d 554, 561-562 (10th Cir. 1979); Bideleman v. Belford, 525 P.2d 649, 651 (Okl.1974).

An action on a bond executed for the purposes of complying with the provisions of 61 O.S.A. §1, must be brought within the time allowed by 61 O.S.A. §2. Mid-Continent Casualty Co. v. W. S. Dickey Clay Mfg. Co., 474 P.2d 647, 652. See also Syllabus 2 by the Court.

The Court, therefore, finds the action was not timely filed by plaintiff against Mid-Continent Casualty Company and Fritz Construction Company unless the partial payments of Miller Electric Shop tolled the statute of limitations.

The Court is of the opinion the partial payments by Miller Electric did not toll the period of limitation as to Mid-Continent Casualty Company and Fritz Construction Company, Inc. There is no evidence in this case that Fritz Construction Company, Inc., or Mid-Continent Casualty Company participated in the partial payments made by Miller or authorized or consented to said payments. No cases in point with reference to a statutory bond have been discovered, but an analogy to actions involving other types of sureties and joint and several obligors on promissory notes can be drawn. The general rule is:

> "...While it is now generally accepted that the statute of limitations is not interrupted as to a surety or endorser by any payment made by a principal without the authority, knowledge or consent of such party unless the contract expressly provides." Barron v. Chicoraske, 113 P.2d 376, 377 (Okl.1941)

Cf. Thomas v. Puett, 177 Okl. 140, 57 P.2d 877; Georgia v. O'Herion, 176 Okl. 103, 54 P.2d 657; Hope v. Gordon, 174 Okl. 368, 50 P.2d 669; Street v. Moore, 172 Okl. 336, 45 P.2d 73; Eichman v. Culver, 169 Okl. 495, 37 P.2d 640.

The Court finds plaintiff's contention that materials not furnished by plaintiff to Miller Electric cause a tolling of the one-year period of limitations is not well founded. The Court found in Conclusion of Law Number 7 the value of labor expended by Miller was $1,412.16 and the value of the equipment Honeywell failed to deliver was $302.00. The contract between plaintiff, Honeywell, and Miller Electric, had been substantially completed.

A hearing was had on plaintiff's request for attorney fees on October 21, 1980. Plaintiff submitted its counsel had spent 246 hours in prosecuting the claim against all of the defendants. It was agreed between Mr. Jack Gaither, attorney for plaintiff, and Mr. Coy Morrow, attorney for defendants, that 10% of the total hours claimed, or 24.6 hours had been devoted to pursuing the claim against Mid-Continent Casualty Company and Fritz Construction Company, Inc. Mr. Phillips Breckinridge, a Tulsa attorney, testified for plaintiff the reasonable hourly rate

for the work performed by plaintiff's counsel was $80.00 per hour. The Court, therefore, finds plaintiff is entitled to recover an attorney fee against the defendant, Miller Electric Shop, Inc., in the amount of $17,712.00. IT IS SO ORDERED.

The Court, therefore, finds the Motion for New Trial of the defendants, Fritz Construction Company, Inc., and Mid-Continent Casualty Company should be granted; the Findings of Fact and Conclusions of Law should be amended to reflect plaintiff's claim against Fritz Construction Company, Inc., and Mid-Continent Casualty Company is barred by the applicable one year statute of limitations contained in 61 O.S. §2; and that portion of the Judgment entered on September 29, 1980, granting judgment in favor of the plaintiff, Honeywell, Inc., and against the defendants, Fritz Construction Company, Inc., and Mid-Continent Casualty Company, in the amount of $23,789.00 should be vacated and set aside and amended judgment entered setting forth the above.

IT IS SO ORDERED.

ENTERED this 9th day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LLOYD CALDWELL,

Plaintiff,

vs.

PATRICIA HARRIS, Secretary of Health and Human Services of the United States of America,

Defendant.

79-C-698-BT

J U D G M E N T

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the defendant, Secretary of Health and Human Services of the United States of America (Secretary), and after due proceedings had, and upon examination of the pleadings and record filed herein, including the briefs submitted by the parties, the Court is of the opinion as shown by its Memorandum Opinion filed simultaneously herewith that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the final decision of the Secretary should be and hereby is affirmed.

Dated this 9th day of December, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LLOYD CALDWELL, Plaintiff,	)	
vs.	)	79-C-698-BT
PATRICIA HARRIS, Secretary of Health and Human Services of the United States of America, Defendant.	)	

MEMORANDUM OPINION

Plaintiff, Lloyd Caldwell, brings this action pursuant to 42 U.S.C. §405(g), seeking judicial review of the final administrative decision of the Secretary of Health and Human Services denying him disability benefits provided for in Sections 216(i) and 223, respectively, of the Social Security Act, as amended. 42 U.S.C. §§416(i) and 423.

Plaintiff filed an application for a period of disability and disability insurance benefits on March 21, 1977 (TR 46-49), alleging that he became unable to work on May 27, 1976, at the age of 46 due to cervical spondylosis with radiculopathy and lumbar spondylosis. The application was granted on May 3, 1977. (TR 78). On August 22, 1978, the Office of Disability Operations of the Social Security Administration determined that plaintiff's disability had ceased in June, 1978, after the Oklahoma State Agency, upon evaluation of the evidence by a physician and disability examiner, found plaintiff's condition had improved. (TR 79-80, 81-82). Plaintiff's claim was then denied after a request for reconsideration. (TR 55-56). Plaintiff's case was considered de novo before an Administrative Law Judge, where plaintiff was represented by counsel on January 23, 1979. On July 3, 1979, the Administrative Law Judge filed his decision, denying plaintiff benefits. (TR 7-13) This decision was affirmed by the Appeals Council on September 25, 1979 (TR 4) and plaintiff thereafter commenced this action requesting judicial review.

An application for Social Security Disability Benefits has the burden of establishing that he was disabled on or before the date on which he last met the statutory earnings requirements. McMillin v. Gardner, 384 F.2d 596 (10th Cir. 1967); Stevens v. Mathews, 418 F.Supp. 881 (USDC WD Okl.1976); Dicks v. Weinberger, 390 F.Supp. 600 (USDC WD Okl.1974); see Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971).

The term "disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which...has lasted...for a continuous period of not less than 12 months." 42 U.S.C. §§416(i)(1)(A); 423(d)(1)(A); 20 C.F.R. 404.1501(a)(i).

The scope of the Court's review authority is narrowly limited by 42 U.S.C. §405(g). The Secretary's decision must be affirmed if supported by substantial evidence. Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966); Stevens v. Mathews, supra. Substantial evidence is more than a scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Beasley v. Califano, 608 F.2d 1162 (8th Cir. 1979); Stevens v. Mathews, supra. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Stevens v. Mathews, supra.

In conducting this judicial review, it is the duty of this Court to examine the facts contained in the record, evaluate the conflicts and make a determination therefrom whether the facts support the several elements which make up the ultimate administrative decision. Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974); Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974); Stevens v. Mathews, supra. In this case, the ultimate

administrative decision is evidenced by the Findings of the Administrative Law Judge before whom plaintiff originally appeared. The Findings of the Administrative Law Judge are as follows: (TR 12-13)

"1. The claimant was found to be disabled within the meaning of the Social Security Act beginning May 27, 1976.

2. The claimant's impairments were cervical spondylosis with radiculopathy, and lumbar spondylosis.

3. The medical evidence shows that beginning in June 1978, the claimant's impairments improved.

4. Beginning June 1978, the claimant had the functional capacity to be up for an eight hour period, sit and stand alternately, had the use of his hands, arms, and eyes.

5. Said functional capacity would permit the claimant to perform work such as parking garage attendant, gate attendant, ticket taker, and coil winder in the sedentary category; and tool crib attendant, toll-booth attendant, and machine tender in the light category.

6. Considering the claimant's age, education, past work experience, and improved functional capacity, the claimant had the ability to engage in substantial gainful activity beginning June 1978.

7. The claimant's disability ceased in June 1978.

8. Entitlement to a period of disability and to disability insurance benefits ended with the close of August 1978."

The elements of proof which should be considered in determining whether plaintiff has established a disability within the meaning of the Act are: (1) objective medical facts; (2) medical opinions; (3) subjective evidence of pain and disability; and (4) the claimant's age, education and work experience. Hicks v. Gardner, 393 F.2d 299 (4th Cir. 1968); Stevens v. Mathews, supra; Morgan v. Gardner, 254 F.Supp. 977 (USDC ND Okl. 1966); Meek v. Califano, 488 F.Supp. 26 (USDC Neb. 1979).

Plaintiff was born January 6, 1930 (TR 22) and attended school into the eighth grade, which he did not finish. (TR 23) His usual occupation was that of a carpenter (TR 23) although he had also worked as a machinist and welder. (TR 23). He

complains of muscle cramps, spasms, (TR 24) and pinched nerves. (TR 25).

Plaintiff was injured on May 27, 1976, when he was hit by a crane at work. Plaintiff worked the remainder of the day although his arm was sore. (TR 94) The next day he noticed he had poor control of his upper extremity but was able to work. (TR 94) Two days later he noted progressive numbness and inability to use his arm and has not worked since. (TR 94) He went to a chiropractor, without significant benefit. (TR 94).

Plaintiff was admitted to Hillcrest Medical Center under the care of Dr. Lins on February 21, 1977, and was discharged February 24, 1977. (TR 83-84) Dr.Lins found his general medical examination unremarkable. There were mild facilitations noted involving the right gastrocnemius . A tremor of the upper extremities was noted, being most prominent on the right. Neurologically the cranial nerves were intact. There was weakness of the right wrist flexors and right grip and plaintiff could not touch his right little finger with his thumb. X-rays of the cervical spine showed degenerative changes, interspace narrowing, a posterior osteophyte and foraminal encroachment bilaterally. Lumbosacral x-rays showed degenerative changes and interspace narrowing. Plaintiff had an electromyogram which was normal and a myelogram which showed small central anterior defects at L3-4, L4-5, L5-S1, C2-3, C3-4, C4-5, and C5-6, as well as slight root sleeve defect at C5-6. (TR 83-84)

Progress notes of Dr. Lins are found at 86-89 of the Transcript covering a period from March 7, 1977 through April 6, 1977. Surgery for anterior cervical fusion was recommended. Plaintiff wore a cervical collar and used muscle relaxants. (TR 86)

On April 6, 1977, Dr. Lins commented (TR 86):

> "It continues to be difficult to separate true organic symptoms and findings from those due to anxiety..."

On April 12, 1977, Dr. Lins rendered a report wherein she stated "[T]his patient is totally disabled and unable to perform any manual labor. The patient is trying to financially afford to have back surgery and will be admitted pending this."

Plaintiff was seen by Kenneth B. Craig, M.D., on June 23, 1978. (TR 99-100) Dr. Craig found there was some tenderness over the lumbosacral and lower back area. He observed plaintiff related hospitalization at Hillcrest Hospital under the care of Dr. Lins where he had a myelogram performed. The patient further stated he had surgery on the cervical spine with fusion of 3 or 4 of the vertebrae in that area.

Plaintiff was seen by Gary M. Lee, M.D. for a psychiatric examination on June 22, 1978. No evidence of a psychiatric disorder was found. (TR 102-103)

Plaintiff was examined by Samuel L. DeLong, M.D., an ophthalmologist on June 22, 1978. Plaintiff's uncorrected vision was 20/60 right and 20/70 left, and was correctable with glasses. (TR 104-106)

On July 17, 1978, Dr. Lins stated: "[I]t is my opinion that Lloyd Caldwell is totally disabled for ordinary manual labor consisting of bending, lifting or stooping. (TR 107)

On August 1, 1978, Dr. Lins rendered a written report. (TR 108-109). She was of the impression there had been improvement in the cervical region and that plaintiff's primary difficulty was with reference to the lumbar region. She was of the further opinion plaintiff had a psychological reaction to his injury and experienced financial difficulties compounding his physical complaints and total disability. She stated plaintiff had been repeatedly told to undergo a repeat myelography for re-evaluation of the lumbar region as well as re-evaluation of the cervical region. Dr. Lins was of the opinion this re-evaluation was necessary to determine if additional surgery were necessary.

On September 21, 1978, Dr. Lins stated (TR 110) plaintiff continued to remain symptomatically unchanged. She stated until plaintiff obtained additional medical treatment she was of the opinion he was "unemployable."

In a physical capacities evaluation completed on February 15, 1979 (TR 120-121), Dr. Lins stated plaintiff could sit, stand, or walk for two hours; lift up to 10 pounds continuously and up to 20 pounds occasionally; carry up to 10 pounds continuously and up to 20 pounds occasionally; use his hands for simple grasping, pulling and pushing, and fine manipulation; use both feet for operating foot controls; and bend, squat, crawl, climb, and reach above shoulder level occasionally. Dr. Lins felt there were mild restrictions on his being around moving machinery, and moderate restrictions on activities involving unprotected heights, driving automotive equipment, or exposure to dust, fumes, and gases.

Ruth Crane, a vocational expert, appeared at the hearing before the Administrative Law Judge. She testified plaintiff has a number of skills which were normally transferrable to other type occupations. She testified plaintiff had transferrable skills involving manual dexterity, eye-hand coordination, mathematical skills and supervisory skills. (TR 37-38). She further testified in response to a hypothetical question if plaintiff had all the restrictions and pain to which he testified, he could perform no job. (TR 39) The vocational expert stated plaintiff could perform sedentary jobs of ticketer, sweet potato inspector, parking garage attendant, sandwich maker, and coil winder, and light jobs of crib attendant, toll booth attendant, and machine tender. (TR 39-41). She further testified these jobs existed in significant numbers in the national economy. (TR 41)

In Social Security Disability cases, the claimant bears the burden of showing the existence of disability as defined by the Act. Parker v. Harris,626 F.2d 225 (2nd Cir. 1980); Demandre v. Califano, 591 F.2d 1088, 1090 (5th Cir. 1979); Lewis v. Califano, 574 F.2d 452 (8th Cir. 1978); McDaniel v. Califano, 563 F.2d 669 (5th Cir. 1977); Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972).

The plaintiff has the burden of proving some medically determinable impairment which prevents him from engaging in any substantial gainful activity. 42 U.S.C. §423(d)(1) and (3). Albertson v. Califano, 453 F.Supp. 610 (USDC Kan. 1978); Garrett v. Califano, 460 F.Supp. 888 (USDC Kan. 1978).

It is not the function of the Court to re-weigh the evidence. See, e.g., Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

In the instant case it seems clear that plaintiff is afflicted with some back and neck problems. The issue present, however, is whether the record supports plaintiff's contention that his impairment is "of such severity" that he cannot engage in gainful employment.

In reaching a conclusion as to disability, both objective and subjective factors are to be considered. These include objective medical facts, diagnoses or medical opinions based on such facts, subjective evidence of pain or disability testified to by the claimant, and the claimant's educational background, age, and work experience. Parker v. Harris, supra, 626 F.2d 225,231; Rivera v. Harris, 623 F.2d 212 (2nd Cir.1980).

Additionally, the credibility of witnesses is a matter for the sound judgment of the Administrative Law Judge.

It is fundamental a claimant under a disability need not submit to all treatment, no matter how painful, dangerous, or uncertain of success, merely because one physician believes that a remedy may be effective. Nichols v. Califano, 556 F.2d 931 (9th Cir. 1977); Hephner v. Mathews, 574 F.2d 359 (6 Cir. 1978); Blankenship v. Califano, 598 F.2d 1041 (6th Cir. 1979).

The Administrative Law Judge did not find plaintiff lacked a problem with his back--he found plaintiff lacked the degree of impairment of severe disability to entitle him to disability benefits. A person with a back ailment may not be precluded from the performance of some type of work. Rhynes v. Califano, 586 F.2d 388 (5th Cir. 1978), rehrg. den., 589 F.2d 1114 (5th Cir. 1979).

The Administrative Law Judge concluded that although plaintiff was not able to perform his former job as a carpenter, he did have the residual functional capacity to perform sedentary light work activity.

In Salas v. Califano, 612 F.2d 480 (10th Cir. 1979) the Court held once plaintiff established his claim of inability to return to his former occupation, the burden of showing the claimant could nonetheless obtain other gainful activity and that such gainful activity is available shifted to the Secretary. See also, Brenem v. Harris, 621 F.2d 688 (5th Cir. 1980).

The Court finds the Secretary has met his burden. The evidence in the case supports a finding that Lloyd Caldwell, though disabled from returning to his previous level of work, is still able to perform other gainful activity.

After thoroughly examining the administrative record before it, the Court is of the opinion that substantial evidence is contained therein to support the Secretary's decision that plaintiff was not disabled within the meaning of the pertinent provisions of the Social Security Act and regulations applicable thereto.

Accordingly, the Secretary's decision should be affirmed and a judgment of affirmance will be entered this date.

ENTERED this 4th day of December, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MFA INSURANCE COMPANY, a foreign insurance corporation,

Plaintiff,

vs.

DONALD L. FOWLER, KATHY FOWLER, and AL BOKHAN HASAN,

Defendants.

NO. 80 C 436 E

REQUEST FOR ORDER
OF DISMISSAL WITHOUT PREJUDICE

COMES now the plaintiff, MFA Insurance Company, and respectfully moves this Court to enter an Order dismissing the above styled and numbered cause of action against the defendant, Al Bokhan Hasan, only, for the reason that said defendant has left the country and is outside the jurisdiction of this Court.

BEST, SHARP, THOMAS, GLASS & ATKINSON

BY: _____
Michael P. Atkinson
300 Oil Capital Building
Tulsa, Oklahoma 74103

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 8th day of December, 1980, the application of plaintiff MFA Insurance Company coming on for hearing, and the Court finding that the defendant, Al Bokhan Hasan, is outside the territorial boundaries of the United States of America and being further advised that the plaintiff wishes to dismiss its cause of action against the defendant Hasan, only, without prejudice to the refiling of same, finds that said application should be granted. IT SO ORDERED.

_____
United States District Judge

5.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BARBARA BARNETT,

Plaintiff,

v.

SCOVILL MANUFACTURING CORPORATION, Hamilton Beach Division, and JOSLIN DRY GOODS COMPANY,

Defendants.

No. 79-C-725-C

FILED

DEC 8 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

NOW on this 11th day of September, 1980, this matter having come on for hearing for purposes of a pre-trial conference and the Court, having considered the Motion to Dismiss of defendant, The Joslin's Dry Goods Co., Inc., and having examined the pleadings filed, finds that the motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss of The Joslin's Dry Goods Co., Inc., is hereby sustained.

Chief Judge, H. Dale Cook

APPROVED:

Frank M. Hagedorn, attorney for plaintiff

Joe Sharp, attorney for Scovill Manufacturing Corporation, Hamilton Beach Division

RDW:sl

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BUSH EVANS MACHINERY COMPANY, INC.,

Plaintiff,

vs.

ALBERT EQUIPMENT COMPANY,

Defendant.

NO. 80-C-330-C

FILED

DEC 8 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON This 8th day of Dec, 1980, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

H. DALE COOK

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

Frank Greer,

Ray R. Fulp, Jr.,

Attorneys for the Plaintiff,

Richard D. Wagner,

Attorney for the Defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MIDWESTERN CONSTRUCTION & SUPPLY OF TULSA, INC., Plaintiff,	)	
vs.	)	No. 78-C-610-E
JOHNS-MANVILLE SALES CORPORATION, Defendant.	)	

FILED

DEC [illegible]

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

The Court, being fully advised in the premises and having been advised that the parties have agreed that the complaint of the plaintiff, Midwestern Construction & Supply of Tulsa, Inc. ("Midwestern") should be dismissed with prejudice, and that the defendant, Johns-Manville Sales Corporation ("Johns-Manville") should recover damages in the amount of Seventy-five Thousand Dollars ($75,000.00) against Midwestern upon the counterclaim of Johns-Manville herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff, Midwestern, is dismissed with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant, Johns-Manville, on its counterclaim against the plaintiff, Midwestern, and that damages be entered in favor of the defendant and against the plaintiff in the amount of $75,000.00 actual damages; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that each party shall bear its own costs and fees, including attorneys' fees, incurred in connection with the entry of this judgment.

DATED this 5th day of December, 1980

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

BLACKSTOCK, JOYCE, POLLARD,
BLACKSTOCK & MONTGOMERY
Suite 300, Renaissance Building
Tulsa, Oklahoma 74103

By _____
Edward F. Montgomery

Attorneys for Midwestern
Construction & Supply of
Tulsa, Inc.

JAMES L. KINCAID
DONALD R. JOSEPH
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5680

By _____
James L. Kincaid

Attorneys for Johns-Manville
Sales Corporation

OF COUNSEL:

CONNER, WINTERS, BALLAINE,
BARRY & McGOWEN
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACOB W. FLEMING and HENRIETTA H. FLEMING, husband and wife,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 80-C-287-E
HERB HIATT and SANDY HIATT, doing business as MARANATHA MOTORS,	)	
Defendants.	)	

NOTICE OF DISMISSAL

Mr. G. W. Newton
Attorney for Defendants
2600 East Skelly Drive
Tulsa, Oklahoma 74105

Please take notice that the above entitled action is hereby dismissed as to the Defendants, Herb Hiatt and Sandy Hiatt, doing business as Maranatha Motors.

FELDMAN, HALL, FRANDEN & WOODARD

By _____
Thomas A. Mann
816 Enterprise Building
Tulsa, Oklahoma 74103
918-583-7129

Attorneys for Plaintiffs

CERTIFICATE OF MAILING

The undersigned certifies that a true and exact copy of the above and foregoing Notice of Dismissal was mailed to Mr. G. W. Newton, Attorney for Defendants, 2600 East Skelly Drive, Tulsa, Oklahoma 74105, on the 3rd day of December, 1980, with proper postage thereon fully prepaid.

_____
Thomas A. Mann

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN G. STEMMONS, Plaintiff,	)	
vs	)	No. 79-C-710-F
UNITED STATES OF AMERICA, Defendant,	)	

ORDER OF DISMISSAL

On this 19th day of November, 1980, upon the written Motion of the Plaintiff for Dismissal Without Prejudice, the Court having examined said motion and over no objections of the Defendant finds, that said motion to dismiss should be granted.

IT IS THEREFORE ORDERED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed without prejudice to any future action.

Sherman G. Finesilver
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FLEET MALONE, Plaintiff,	)	
vs	)	No. 79-C-709-F
UNITED STATES OF AMERICA, Defendant,	)	

ORDER OF DISMISSAL

On this 19th day of November, 1980, upon the written Motion of the Plaintiff for Dismissal Without Prejudice, the Court having examined said motion and over no objections of the Defendant finds, that said motion to dismiss should be granted.

IT IS THEREFORE ORDERED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed without prejudice to any future action.

Sherman G. Finesilver
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT B. SCRUGGS, Plaintiff,	)	
vs.	)	No. 79-C-443-F
UNTIED STATES OF AMERICA, Defendant,	)	

ORDER OF DISMISSAL

On this 19th day of November, 1980, upon the written Motion of the Plaintiff for Dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure, the Court having examined said motion and over no objections of the Defendant finds, that said motion to dismiss should be granted.

IT IS THEREFORE ORDERED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed.

Sherman G. Finesilver
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 4 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ESCOA FINTUBE CORPORATION, an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 80-C-402-E
PROCESS COOKING AND CONTROL, INC., a Georgia corporation,	)	
Defendant.	)	

Notice of DISMISSAL

Comes now the Plaintiff and hereby dismisses the above cause without prejudice.

Dated this 2nd day of DECEMBER, 1980.

ESCOA FINTUBE CORPORATION

By _____
LESLIE S. HAUGER, JR.
Attorney for Plaintiff

LESLIE S. HAUGER, Jr.
Attorney at Law
TULSA, OKLAHOMA

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC - 4 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

PHYLLIS ROBINSON,

Plaintiff

vs.

TERRY MILLER AND JOHN MILLER, d/b/a FASCO DAIRY QUEENS, a partnership

NO. 80-C-568-C

NOTICE OF DISMISSAL

COMES now the plaintiff and does hereby serve notice to the court and parties herein that she is dismissing her complaint filed on the 26th day of September, 1980, without prejudice, and according to Rule

Terrel B. DoRemus
Attorney for the Plaintiff
Swanson and DoRemus
711 Thurston Natl. Bldg.
Tulsa, Oklahoma 74103
(918)584-4431

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed this 4th day of December, 1980, to the attorney of record for the defendants, Mr. John M. Keefer, 502 West 6th Street, Tulsa, Oklahoma 74103, with sufficient postage thereon fully prepaid.

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC - 4 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

BECKY KELLUM,

Plaintiff

vs.

TERRY MILLER AND JOHN MILLER, dba FASCO DAIRY QUEENS, INC., a partnership,

NO. 80-C-558-E

NOTICE OF DISMISSAL

COMES now the plaintiff and does hereby serve notice to the court and parties herein that she is dismissing her complaint filed on the 26th day of September, 1980, without prejudice, and according to Rule

Terrel B. DoRemus
Attorney for the Plaintiff
Swanson and DoRemus
711 Thurston Natl. Bldg.
Tulsa, Oklahoma 74103
(918)584-4431

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed this 4th day of December, 1980, to the attorney of record for the defendants, Mr. John M. Keefer, 502 West 6th Street, Tulsa, Oklahoma 74103, with sufficient postage thereon fully prepaid.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE DONALD CECIL STANDRIDGE and ROSE MARIE STANDRIDGE, Debtors, JIM MAPLE CHEVROLET CO., of Antlers, Oklahoma, an Oklahoma corporation, Plaintiff, vs. DONALD CECIL STANDRIDGE and ROSE MARIE STANDRIDGE, Defendants.	)	No. 80-C-165-E

FILED

DEC 31 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has before it an appeal from the judgment of the Bankruptcy Court entered on January 8, 1980, in Bankruptcy No. 79-01313, wherein the Plaintiff's objection to Debtor's claim of exemption as to real property was overruled. The sole question on appeal is whether or not the Bankruptcy Court was justified in finding that Rose Standridge should be granted an exemption based upon the homestead status.

The appellants' position is that she, as well as her husband, abandoned the homestead, and that the evidence indicates a conscious effort by the Debtors to illegally avoid the payment of debts; specifically to discharge the debt by bankruptcy, exempt the house, then sell retaining profits free and clear.

The Defendant's position is that there was no effort to illegally avoid the payment of debts. The Defendant states that the evidence at the hearing showed that the homestead character of the property was never waived or abandoned.

Under Rule 810 of the Bankruptcy Rules, the District Court is required to accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. The findings of the Bankruptcy Court will not be disturbed unless cogent reasons to reject these findings appear on the record. In the Matter of Vickers, 577 F.2d

683 (Tenth Cir. 1978); Wolfe v. Tri-State Insurance Co., 407 F.2d 16 (Tenth Cir. 1969); In Re Perdue Housing Industries, Inc., 437 F.Supp. 36 (W.D. Okla. 1977).

Although the Bankruptcy Court did not make formal findings and conclusions, partial findings and conclusions were made orally and are contained in the partial transcript. The Bankruptcy Judge accepted as true that Rose Standridge did not intend to abandon her homestead interest and that was supported by subsequent events such as her moving back into the house after the divorce.

Therefore the question of Rose Standridge's intent to retain her homestead interest became an issue. Questions of a Defendant's intent are questions of fact and the Bankruptcy Court's findings are conclusive in the absence of clear error, e.g., Carini v. Matera, 592 F.2d 378 (Seventh Cir. 1979); In re Nelson, 561 F.2d 1342 (Ninth Cir. 1977). The burden is on the party appealing the Bankruptcy Court's decision to show it was clearly erroneous, e.g., In re Transystems, Inc., 569 F.2d 1364 (Fifth Cir. 1978); Martin v. Mercantile Financial Corp., 404 F.2d 886 (Fifth Cir. 1969); In re Dawson, 446 F.Supp. 196 (E.D. Mo. 1978).

The Plaintiff argues that waiver and abandonment of the homestead rights occurred in this case. However, an alleged homestead abandonment must be established by clear, conclusive, and convincing evidence. Hildebrand v. Harrison, 361 P.2d 498, 506 (Okla. 1961). In order to constitute an abandonment, it must be shown that Plaintiff is left with a fixed determination never to return. Lane v. Amos, 43 P.2d 73, 75 (Okla. 1945); Brown v. Turner, 207 P.2d 927 (Okla. 1949).

The Court has carefully examined the record, the briefs and the applicable authorities on the issue being appealed and can find nothing that shows the judgment of the Bankruptcy Court to be clearly erroneous, and this Court finds that the Bankruptcy Court's judgment should be sustained.

THEREFORE IT IS THE ORDER OF THIS COURT That the judgment of the Bankruptcy Court on the issue before this Court be and

the same is hereby affirmed.

It is so Ordered this 2nd day of December, 1980.

James O Ellison

JAMES O ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. 80-C-373-E
)
PATTY PRECISION PRODUCTS)
COMPANY,)
)
Defendant.)

FILED

DEC 3 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

On the 10th day of September, 1980, this matter came on for hearing before the undersigned on Plaintiff's motion for preliminary injunction. At that time, Plaintiff moved to dismiss this case without prejudice; Defendant had no objections to dismissal but requested that any dismissal be with prejudice. Having heard counsel, the Court, at that time, orally ruled that dismissal without prejudice be granted. All pending motions in this case were thereby rendered moot.

IT IS, THEREFORE, ORDERED that Plaintiff's motion be granted, and that this action be dismissed without prejudice.

Entered this 2nd day of December, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. M.T. PRODUCTS, LTD., a corporation and MILDRED TRUMBULL, an individual, Defendant.	)	Civil Action No. 80-C-482

CONSENT DECREE OF PERMANENT INJUNCTION

The United States of America, having filed its complaint on the 22nd day of August, 1980, and the defendants, M.T. Products, Ltd., a corporation, and Mildred Trumbull, an individual, having appeared and having consented to the entry of this decree without contest and before any testimony has been taken, or any findings of fact made, and the United States of America having consented to the entry of this decree and to each and every provision thereof, and having moved this Court for this injunction, it is

THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Court has jurisdiction of the subject matter herein, and of all persons or parties hereto, and the complaint states a claim for relief against the defendants under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §301, et seq.

2. That the defendants, M.T. Products, Ltd., a corporation, and Mildred Trumbull, an individual, and their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them be perpetually restrained and enjoined from directly or indirectly doing or causing to be done the following acts:

A. Introducing or delivering for introduction into interstate commerce as drugs within the meaning of 21 U.S.C. 321(g), the products OM 12, Vital Force and the Liliverum

products manufactured by the defendants or any similar article designated by any other name containing any of the same or similar ingredients, including but not limited to, the extract of the Lily genus (Lilium); and

B. Manufacturing, processing, packing, and/or labeling as drugs within the meaning of 21 U.S.C. §321(g), the products OM-12 and Vital Force, and the Liliverum products manufactured by the defendants, which are drugs within the meaning of 21 U.S.C. §321(g), or any similar article designated by any other name containing any of the same or similar ingredients, including but not limited to, the extract of the Lily genus (Lilium), while held for sale after shipment of one or more of its ingredients in interstate commerce, unless and until: (i) an approved application filed pursuant to 21 U.S.C. §355(b) is effective with respect to said drug, or (ii) a Notice of Claimed Investigational Exemption (IND) acceptable to FDA and filed pursuant to 21 U.S.C. §355(i) and regulation 21 CFR 312.1 is on file for such drug; or (iii) the Food and Drug Administration pursuant to paragraph 5 below has advised the defendants in writing that the product is not a "new drug"; and

C. Promoting or labeling the product OM-12 or any similar article (or any component intended for use in such article) for any drug claims that represent or suggest that such article is effective for the diagnosis, cure, mitigation, treatment, or prevention of disease in man. This subparagraph does not preclude the sale or distribution of OM-12 when properly labeled as a food for special dietary use within the meaning of Sections 403(j) and 411 of the Act (21 US.C. §343(j) and §350) provided that the defendants submit to the Food and Drug Administration the labeling as provided in Paragraph 5 below.

3. That defendants shall register pursuant to 21 U.S.C. §360(b) and all drugs manufactured, prepared, propagated, compounded or processed by defendants shall be listed pursuant to 21 U.S.C. §360(j) and 21 CFR Part 207.

4. Duly authorized representatives of the Food and Drug Administration be granted free access to said plant for the purpose of making such inspections of the plant, including the building, pertinent equipment, finished and unfinished materials, containers, labeling, and all records relating to the methods used in, and the facilities and controls used for the manufacture, processing, packing, labeling, holding, and distribution of drugs, including the distribution records for the Liliverum products or any similar product containing an extract of the Lily genus (Lilium), and also including the notification provisions of this Decree, as provided in Section 704 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §374). Such inspections shall be conducted at reasonable times and under reasonable conditions as the Food and Drug Administration deems necessary to determine whether the requirements set forth above in Paragraph 2 have been and continue to be met.

5. That the defendants, M.T. Products, Ltd., a corporation, and Mildred Trumbull, an individual, shall discontinue use of the labeling at issue in this case, for OM-12 and Vital Force, and shall provide the Food and Drug Administration with revised labeling for the products OM-12 and Vital Force or any similar products designated by any other name manufactured by defendants containing any of the same or similar ingredients in order for FDA to determine whether such product as so labeled is a new drug within the meaning of Section 201(p) of the Federal Food, Drug and Cosmetic Act, (21 U.S.C. §321(p).). The Food and Drug Administration agrees to advise the defendants and this Court of its findings. Any alteration, addition, or deletion of any kind in the labeling of the above-described products, including the use of supplemental written or oral promotional material must be reviewed by FDA prior to its use.

6. That the defendants, M.T. Products, Ltd., a corporation, and Mildred Trumbull, an individual, shall give written notice (by registered mail, return receipt requested) of the provisions of this decree to each and all of their officers, agents, servants,

employees, and any and all persons now or in the future in active concert or participation with them or any of them who have assisted or participated in the manufacture and distribution of the aforesaid articles.

7. That jurisdiction of this Court is retained for the purpose of enforcing and modifying this decree and for the purpose of granting such additional relief as may hereafter appear necessary or appropriate.

8. That this decree does not preclude the Food and Drug Administration from pursuing any other remedy available to it under the Federal Food, Drug and Cosmetic Act (21 U.S.C. §301, et seq.).

9. This consent decree does not serve as an acceptance of any of the allegations made in the defendants' pleadings or affadavit submitted in support of such pleading.

10. This consent decree affects products introduced or delivered for introduction into interstate commerce or containing ingredients which have been shipped in interstate commerce, but not products which have not been introduced or delivered for introduction into interstate commerce and which do not contain ingredients that have been shipped in interstate commerce.

11. That the plaintiff, the United States of America, have and recover from the defendants the cost of this action, as taxed herein, to wit, the sum of $ 70.56 , and that plaintiff have execution therefor.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12-3-80

Entry consented to by:

CHRIS L. RHODES

KIRKPATRICK W. DILLING

Attorneys for Defendants

HUBERT H. BRYANT
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORVAL E. HIXSON,

Plaintiff,

-vs-

PILOT LIFE INSURANCE COMPANY, a foreign insurance corporation,

Defendant.

No. 80-C-367-E

ORDER OF DISMISSAL

On this 2nd day of December, 1980, upon written application of the parties for an order of dismissal with prejudice of the complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested this Court to dismiss the Complaint with prejudice to any future action, the Court being fully advised in the premises, finds that said complaint should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same are hereby dismissed with prejudice to any further action.

U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD LEON PEARSON, Plaintiff,	)	Civil Action No. 79-C-632-BT
TERRY WAYNE TABER, Plaintiff,	)	Civil Action No. 79-C-631-BT
DONNA JOY TABER, Plaintiff,	)	Civil Action No. 79-C-630-BT
vs.	)	
UNITED STATES OF AMERICA, BUREAU OF INDIAN AFFAIRS, Defendant.	)	

FILED

DEC 2 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law heretofore entered, the Court hereby enters judgment for the following plaintiffs against the defendant as provided:

1. Donna Joy Taber - Judgment in the sum of $600.00, interest at the rate of 12%, and the costs of this action;

2. Terry Wayne Taber - Judgment in the sum of $7500.00, interest at the rate of 12%, and the costs of this action;

3. Ronald Leon Pearson - Judgment in the sum of $60,000.00, interest at the rate of 12%, and the costs of this action.

Dated this 2nd day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD LEON PEARSON, Plaintiff,	)	Civil Action No. 79-C-632-BT
TERRY WAYNE TABER, Plaintiff,	)	Civil Action No. 79-C-631-BT
DONNA JOY TABER, Plaintiff,	)	Civil Action No. 79-C-630-BT
vs.	)	
UNITED STATES OF AMERICA, BUREAU OF INDIAN AFFAIRS, Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW - DAMAGES

Findings of Fact and Conclusions of Law relative to liability, finding in favor of the plaintiffs and against the defendant, were filed August 28, 1980. On November 28, 1980 there was a trial to the Court relative to damages claimed by each plaintiff. The following are Findings of Fact and Conclusions of Law concerning the damages experienced by each plaintiff:

FINDINGS OF FACT

A. DONNA JOY TABER - No. 79-C-630

1. As a result of the vehicle accident Donna Joy Taber experienced traumatic contusion type injury to her mouth, teeth, and left leg of a superficial and temporary nature.

2. The plaintiff had medical expenses of $101.50 and lost wages of $75.00.

3. The plaintiff experienced pain and discomfort for approximately two weeks.

B. TERRY WAYNE TABER - No. 79-C-631

1. As a result of this vehicle accident Terry Wayne Taber experienced traumatic contusion type injury to his head and a non-displaced longitudinal fracture of the left kneecap. The fracture treatment required a long leg splint and healed well

within two to three months.

2. The plaintiff experienced minimum permanent disability from the left knee fracture and infrequently experiences discomfort from prolonged stress of the knee. Traumatic arthritis in the future is likely but when it will occur and to what extent is problematical. The plaintiff was 24 years of age at the time of the accident with a life expectancy of 48 years.

3. The plaintiff lost wages of $724.93 and had medical expenses totaling $946.53.

C. RONALD LEON PEARSON - No. 79-C-632

1. As a result of this vehicle accident Ronald Leon Pearson experienced traumatic contusion type injury generally about his body and a compound-comminuted fracture of the left tibia and fibula. Treatment of the left leg fracture required two periods of hospitalization; in May 1978 for a closed reduction procedure with casting, placement of pins, and traction followed in November 1978 by a bone graft procedure [bone from thigh to fracture site and insertion of plate for fixation] to promote otherwise incomplete healing. The plaintiff was off work approximately eleven months due to his injury. Permanent disability remains primarily in restricted motion in plantar and dorsiflexion,some in pronation and supination, minimal atrophy, discoloration and sensitivity below the left knee. The plaintiff experiences some swelling of the left leg below the knee from prolonged use or stress. Traumatic arthritis is not expected in the future unless joint injury was involved which was not reflected on x-ray. The plaintiff functions reasonably well in his present job as a ranch foreman which requires considerable physical activity. The plaintiff did not return to his previous job as a tank welder because he was medically advised before this accident to find another line of work to avoid the stress to his knees required from working on them.

2. The plaintiff incurred medical expenses totalling $6,654.87, $12,014.00 past lost earnings, and damage to his Volkswagen automobile in the sum of $990.00, which was a total loss.

3. The plaintiff was 28 years of age and had a life expectancy of 44.3 years at the time of the accident.

CONCLUSIONS OF LAW

1. The plaintiff, Donna Joy Taber, for her past pain and suffering, temporary disability, medical expense and lost earnings, is entitled to have a judgment entered in her behalf against the defendant in the sum of $600.00.

2. The plaintiff, Terry Wayne Taber, for his past and future pain and suffering, past and future disability, lost earnings and medical expenses, is entitled to have a judgment rendered against the defendant in the sum of $7500.00.

3. The plaintiff, Ronald Leon Pearson, for his past and future pain and suffering, past and future disability including disfigurement, lost and impaired earnings, medical expense and automobile damage, is entitled to a judgment to be entered against the defendant in the sum of $60,000.00.

Dated this 2nd day of December, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MFA INSURANCE COMPANY, a Foreign Insurance Corporation, Plaintiff,	)	
vs.	)	No. 80-C-436-E
DONALD L. FOWLER, KATHY FOWLER, and AL BOKHAN HASAN, Defendants.	)	

ORDER

It appearing to the Court that a valid entry of default has been made in this action, and that the plaintiff herein has fully complied with the requirements of Federal Rule of Civil Procedure 55, and upon viewing the pleadings and Affidavits filed herein; this Court finds that the plaintiff is entitled to the declaratory relief for which it has prayed.

It is therefore the finding and order of this Court that the automobile liability policy between the plaintiff and defendants herein terminated on November 30, 1979, and thereafter the plaintiff, MFA Insurance Company, was released from all obligation for incidents occurring after that date.

H. DALE COOK ELLISON

Judge of the District Court

FILED

DEC 2 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARK ANTHONY GANN, Plaintiff,	)	
vs.	)	Civil Action No. 80-C-22-E
SAFEWAY STORES, INC., of Maryland, Defendant.	)	

FILED

DEC 1 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION FOR DISMISSAL

Come now the parties by their respective attorneys of record and hereby represent and state to the Court that this case has been settled and should be dismissed with prejudice to the refiling thereof.

Attorney for Plaintiff

Attorney for Defendant

FILED

DEC 1 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANA DEAN COX, Plaintiff,	)	
vs.	)	Civil Action No. 80-C-23-E
SAFEWAY STORES, INC., of Maryland, Defendant.	)	

STIPULATION FOR DISMISSAL

Come now the parties by their respective attorneys of record and hereby represent and state to the Court that this case has been settled and should be dismissed with prejudice to the refiling thereof.

Attorney for Plaintiff

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRIDGET COLLETTE WILEY, Plaintiff,	)	
vs.	)	No. 80-C-439-C
AETNA LIFE AND CASUALTY INSURANCE COMPANY and McMICHAEL CONCRETE COMPANY, Defendants.	)	

O R D E R

Now before the Court for its consideration is the Motion to Dismiss or In the Alternative for Summary Judgment of the defendant Aetna Life and Casualty Insurance Company (Aetna).

Aetna is the workers' compensation insurer for Hensel Phelps Construction Company, the general contractor for the expansion of the terminal building at the Tulsa International Airport. Plaintiff's husband was an employee of American Construction and Erection Service Company, Inc. (ACESCO), the subcontractor for the structural steel, iron, and pre-cast concrete erection work at the terminal building. From time to time, Aetna made visits to the job site to make a review or inspection of overall site safety. Aetna had the option to do this under its insurance contract with Hensel Phelps. On July 2, 1979, plaintiff's husband was injured during the course of his employment by ACESCO when he was struck on the head by a falling steel beam. He later died as the result of his injuries. The plaintiff charges Aetna with negligence in that it allegedly failed to make the safety inspections previously referred to and allegedly failed to warn of unsafe conditions. Plaintiff also makes certain claims against McMichael Concrete Company which are not pertinent to the present motion.

As grounds for dismissal, Aetna contends that it enjoys the same immunity from a common law tort suit as its insured, Hensel Phelps, under the Oklahoma Workers' Compensation Act, 85 O.S. §1, et seq., and that this Court therefore lacks subject matter jurisdiction over the plaintiff's claim against it. The plaintiff has received the workers' compensation benefits payable on the death of her husband and Aetna claims that this is her exclusive remedy.

Aetna refers the Court to United States Fidelity and Guaranty Co. v. Theus, 493 P.2d 433 (Okla. 1972). In that case the plaintiff was an employee of an independent contractor and he was suing the workmen's compensation carrier of the prime contractor or principal employer for negligence in carrying out safety inspections of his job site. He had received workmen's compensation benefits for his injuries. The court held that the exclusive forum for the principal employer was the same as for the independent contractor; that the Workmen's Compensation Law specifically prohibited a common law suit against a covered employer; and that the intent of the Workmen's Compensation Law was to make the insurance carrier one and the same as the employer as to liability and immunity. It therefore held that the Industrial Court had exclusive jurisdiction and the defendant insurance company was immune from suit. That case gives very thorough support to Aetna's present contentions. See also Maryland Casualty Co. v. Hankins, 532 P.2d 426 (Okla. 1975).

The plaintiff attempts to distinguish United States Fidelity and Guaranty Co. v. Theus on the ground that the worker there was only injured whereas in this case, the worker died from his injuries. Under 85 O.S. §44(b), the insurer paying death benefits is not subrogated in a death action to rights against third persons. In Theus, the court noted that some jurisdictions which do not permit a common

law action against the insurer so hold because of their subrogation statutes, which, if they held otherwise, would permit the insurer to sue itself under certain circumstances. Since the worker was only injured in Theus there would be a right of subrogation and that reasoning would support the holding there. The plaintiff contends that the Theus holding loses that support under the facts of the instant case because this is a death action with no right of subrogation.

The Court must reject this argument. The court in Theus also noted that some jurisdictions which do not permit a common law action against an insurer so hold because the

> cumulative effect of statutes indicated the carrier and the employer are equally responsible to the injured workmen, therefore the carrier is immune from common law suit the same as the employer. 493 P.2d at p.435.

The court found a similar "cumulative effect" in the Oklahoma statutes and this was the basis for the court's holding. The reasoning referred to earlier was simply part of a discussion of the law in other jurisdictions and was not necessary to the holding.

For the foregoing reasons, it is therefore ordered that the motion to dismiss of the defendant Aetna Life and Casualty Insurance Company is hereby sustained. The alternative motion of the defendant Aetna for summary judgment is therefore overruled as it is moot.

It is so Ordered this 1st day of ~~November~~ December, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 73-CR-103
ROBERT EUGENE COTNER, Defendant.	)	80-C-384-C

O R D E R

Now before the Court is the motion of petitioner Robert E. Cotner, pro se, to vacate his sentence imposed under 28 U.S.C. §2255 in Case No. 73-CR-103 in the Northern District of Oklahoma on January 22, 1974. The sentence imposed on petitioner consisted of one year each on two counts of mail fraud, to run concurrently. Petitioner admits that he entered a plea of nolo contendere in 73-CR-103 and further alleges that U. S. District Judge Allen Barrow agreed, in open court, to accept a nolo contendere plea, with the understanding that he would sentence the petitioner herein to a one-year suspended sentence, but would expunge it one year after defendant located the main witness needed for defense and filed a motion to withdraw his nolo contendere plea.

Petitioner states four grounds on which relief should be granted. First, he claims that he was denied effective assistance of counsel, and was refused a hearing on his request to withdraw his plea and/or to appeal. Secondly, he alleges that his conviction was obtained by the unlawful failure of the prosecution to disclose evidence favorable to the defendant, that the indictment was brought in the wrong judicial district, and that the prosecution knew of both errors and failed to disclose them. Thirdly, petitioner

alleges "newly discovered" evidence, apparently consisting of alleged perjury by a witness and a recently-discovered defense witness. Fourthly, petitioner alleges that the indictment and conviction was obtained by evidence obtained pursuant to an illegal lineup or identification procedure, and an illegal search and seizure.

The Court has examined the record and concludes that the motion is frivolous and wholly without merit. The record reflects that on September 5, 1973 an indictment was filed in U. S. District Court for the Northern District of Oklahoma. On November 15, 1973, the defendant appeared in Court, represented by Elmore A. Page, retained counsel, was arraigned and entered a plea of Not Guilty as to Counts 1 and 2. On December 12, 1973 the case was set for jury trial. On January 17, 1974 petitioner appeared in Court, represented by counsel, for the purpose of changing his plea of Not Guilty to Nolo Contendere over the government's objection. The record also shows that the Court found a factual basis for the plea. On January 22, 1974 sentence was entered, and on February 4, 1974 defendant began serving his sentence. On July 25, 1974, the case was called for hearing on defendant's motion that time spent under release on bond be deducted from his sentence. Defendant was represented by counsel. The motion was denied and defendant appealed. On February 14, 1975 the Mandate of the Tenth Circuit Court of Appeals issued, dismissing the appeal for mootness inasmuch as appellant had already served the sentence on which he sought bond time credit.

It is well-established that for all practical purposes the plea of nolo contendere is treated the same as a plea of guilty. Fisher v. Schilder, 131 F.2d 522 (10th Cir. 1942); U.S. v. Feltman, 451 F.2d 153 (10th Cir. 1971); Clark v. Western District of Oklahoma, 399 F.Supp. 305, 307 (N.D.Okla. 1975). Such a plea waives all non-jurisdictional defects in

the proceedings against the accused. Clark v. Western District of Oklahoma, supra; United States v. Grayson, 416 F.2d 1073 (5th Cir. 1969), cert. denied, 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753, reh. denied, 399 U.S. 917, 90 S.Ct. 1114, 25 L.Ed.2d 415. As the court in Clark stated, "a plea of guilty [nolo contendere] voluntarily made forecloses an accused's right to object to the manner in which he was arrested or how the evidence may have been obtained against him. The plea is a waiver of all non-jurisdictional defenses and a sentence which would follow such a plea of guilty [nolo contendere] is a result of the plea and not the evidence theretofore obtained." Mahler v. United States, 333 F.2d 472, 474 (10th Cir. 1964), cert. denied 379 U.S. 993, 85 S.Ct. 709, 13 L.Ed.2d 613: United States v. Doyle, 348 F.2d 715 (2nd Cir. 1965), cert. denied 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84; Bailey v. United States, 324 F.2d 632 (10th Cir. 1963); Atkins v. State of Kansas, 386 F.2d 819 (10th Cir. 1967).

Finally, there is simply no truth in petitioner's assertion that he was denied effective assistance of counsel. As indicated by the record, petitioner was adequately represented by counsel at his arraignment, change of plea hearing, and at the hearing on his motion for bond time. The appeal of the denial of this motion was filed by the petitioner pro se. Thus the record does not support petitioner's claim, nor does he offer additional facts in support of his claim. The burden on the petitioner to establish a claim of ineffective assistance of counsel is great. Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir. 1970). The standard for competency of counsel at the time petitioner's plea was entered was that stated in Basker v. Crouse, 426 F.2d 531, (10th Cir. 1970); Frand v. U.S., 301 F.2d 102 (10th Cir. 1962): Unless the Court can say that the incompetency of the attorney was such

as to amount to making the proceedings a mockery, sham, or farce, collateral relief must be denied. The current standard in the Tenth Circuit, as stated in Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), reh. denied Feb. 20, 1980, cert. denied, 100 S.Ct. 1342, requires that representation not fall below that expected of a reasonable, competent, and skillful defense attorney. A review of the record shows that under either standard, there is no evidence of a breach of duty by petitioner's counsel or that his advice was not within the range of competence required of him. Further, there is no evidence in the record, nor has the petitioner alleged any facts in support of his contentions as to denial of effective assistance of counsel or as to refusal of a hearing on a request to withdraw his plea and/or to appeal.

The petitioner's application together with the files and records of petitioner's criminal case conclusively show that there are no material issues of fact and that petitioner is not entitled to relief. It is well-established that when a motion is made to vacate a sentence, the movant must set forth facts and not merely conclusions. (Sobell v. U.S., D.C.N.Y. 1967, 264 F.Supp. 579, affirmed 378 F.2d 674, cert. denied 88 S.Ct. 780, 389 U.S. 1051, 19 L.Ed.2d 842, rehearing denied 88 S.Ct. 1025, 390 U.S. 977, 19 L.Ed.2d 1197).

In addition, as to petitioner's allegations that his retained attorney failed to take an appeal, it is a clear requirement that petitioner indicate plain error in the original trial proceedings as a condition to granting a motion for vacation of sentence. Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied 382 U.S. 852, 86 S.Ct. 100, 15 L.Ed.2d 90 (1965). No evidence has been advanced by petitioner nor does the record show plain error in the original proceedings.

For all these reasons, petitioner's motion to vacate

sentence is hereby overruled.

It is so Ordered this 1st day of ~~November~~ December, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BRIDGET COLLETTE WILEY, Plaintiff,	)	
vs.	)	No. 80-C-439-C
AETNA LIFE AND CASUALTY INSURANCE COMPANY and McMICHAEL CONCRETE CO., Defendants.	)	

FILED

1980

MOTION AND STIPULATION OF DISMISSAL

The plaintiff, Bridget Collette Wiley, moves that she be allowed to dismiss her cause of action against the defendant, McMichael Concrete Co., only; and the other parties hereto hereby stipulate and agree that the plaintiff may dismiss her cause of action against the defendant, McMichael Concrete Co., only.

GARRISON & COMSTOCK, INC.

BY George R. Rhoads
GEORGE R. RHOADS
Attorney for Plaintiff

ROGERS, ROGERS, HONN, HILL, SECREST & McCORMICK

BY s/ Richard Honn
RICHARD HONN
Attorney for Defendant McMichael

KNIGHT, WAGNER, STEWART & WILKERSON

BY _____
DAN WAGNER
Attorney for Defendant Aetna